United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 226

ORANGE BELT DISTRICT COUNCIL
OF PAINTERS NO. 48, AFL-CIO,
ITS AFFILIATED LOCAL UNIONS,
AND ITS AGENTS,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For Review of An Order of The National
Labor Relations Board And Cross Petition
For Enforcement

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,752

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PREHEARING CONFERENCE STIPULATION

To the Honorable, the Judges of the United States
Court of Appeals for the District of Columbia Circuit:

Pursuant to Rule 38(k) of the Rules of this Court, the parties, subject to the Court's approval, hereby stipulates and agree as follows:

I. THE ISSUES

1. Whether the Board erred in finding Petitioners to have violated Sections 8(b) (4)(i) and (ii)(B) of the Act by picketing at the main entrance to a construction site when the primary employer's employees were using a private or reserved entrance to the site.

2. Whether the Board's decision, finding a violation in the circumstances here present, impinges upon Petitioners' rights under the First Amendment to the Constitution of the United States.

II. DESIGNATION OF RECORD

The record in this case shall be reduced to a joint appendix comprising the materials each party designates, with each party bearing

the cost of printing the material contained in its designation. The Board will be responsible for the multilith printing of the joint appendix. The joint appendix will be filed when the petitioners file their opening brief.

/s/ Marcel Mallet-Prevost

Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D.C.,
this 10th day of December,
1965.

Dated at Washington, D.C.,
this _____ day of December,
1965.

_____
Counsel for Petitioners

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Twenty-First Region

ORANGE BELT DISTRICT COUNCIL OF PAINTERS NO. 48, AFL-CIO (Cecil Mays Construction Co.; Calhoun Drywall Company), Respondent and FRANK A. CALHOUN, d/b/a CALHOUN DRYWALL COMPANY, Charging Party.	Case No. 21-CC-686

Hearing Room 1,
849 South Broadway,
Los Angeles, California 90014
Friday, April 3, 1964

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock, a.m.

BEFORE:

E. DON WILSON, Esq., Trial Examiner

* * * * * * *

EARL MAYES

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT

* * * * * * *

Q. Did there come a time after this period that Calhoun's men returned to the job? A. They came back later, a few days later.

Q. When they came back, did the pickets return? A. Yes.

Q. Did that have any effect as to the employees of the other subcontractors? A. It had --

TRIAL EXAMINER: You do not have the subcontractors' other employees back on the jobsite yet. You had them walk off. Now, are they still off?

MR. GRODSKY: All right, I will withdraw it.

Q. (By Mr. Grodsky) When Calhoun's employees did not return to work the following day, did the pickets picket? A. No, they -- not when they found out that the Calhoun's men were not on the job, they didn't.

Q. Did the employees of the other subcontractors return to work? A. Yes, they came back the day after it.

Q. Did they work until the date when Calhoun's employees came back on the job again? A. They worked all the time except when the pickets were there.

Q. A few days later, you testified, Calhoun's employees returned to the job; is that correct? A. Yes.

Q. When Calhoun's employees returned to the job, did the pickets resume picketing? A. That is correct.

Q. When the pickets resumed picketing what effect did it have on the employees --

TRIAL EXAMINER: With or without the same sign, or don't you care about the same sign?

MR. GRODSKY: It has always been the same sign, Mr. Trial Examiner.

TRIAL EXAMINER: Well, you are telling me. Are you now testifying?

Q. (By Mr. Grodsky) Was the picketing always with the same sign? A. They always had the same sign every time I looked out there.

MR. GRODSKY: Mr. Ansell, could we have a stipulation that they always picketed with the same sign?

MR. ANSELL: Just a second. As the sign is alleged in your complaint, is that correct?

MR. GRODSKY: That is correct.

TRIAL EXAMINER: Paragraph --

MR. ANSELL: Paragraph 6?

TRIAL EXAMINER: The stipulation -- do you so stipulate?

MR. ANSELL: So stipulate.

MR. GRODSKY: So stipulate.

* * * * * * *

98 Q. On both of these occasions after Calhoun took his employees
99 off the jobsite the picketing ceased, is that correct? A. Correct.

Q. Then after a few days when they had returned the picketing would commence again, is that correct? A. That's correct.

Q. Was this sign that you have testified about already the sign saying, "Frank A. Calhoun is unfair and operates under sub-standard working conditions. District Council of Painters 48"? Is that correct? A. That's what the sign said, yes.

Q. The picketing took place, sir, on the sidewalk on East 17th Street in front of the two entrances, is that correct? A. Correct.

99 Q. So that when you say that picketing took place on the jobsite you mean on the sidewalk on East 17th Street, is that right? A. That's right.

Q. Did you testify that employees of some of the other contractors would leave when the picketing would commence? Is that correct? A. Yes, sir.

Q. Did you ever actually see employees of other contractors walk off the job? A. Did I ever ask them?

* * * * * * *

102 Q. You didn't, but do you know who did? A. No, I don't know
103 who did.

TRIAL EXAMINER: Did you prepare the one that went on the so-called two entrances?

THE WITNESS: No, sir.

Q. (By Mr. Ansell) Yes?

TRIAL EXAMINER: Do you know who did?

THE WITNESS: No, I don't know who did.

MR. ANSELL: I see.

Q. (By Mr. Ansell) Let me direct your attention to this little diagram (indicating) although it is not in evidence. It is perhaps too crude to put into evidence, but just so we can both be aided by it, you have a recollection, an independent recollection now that to the east of the construction jobsite there is an orange grove, is that correct? A. No, there is not -- that is not correct.

Q. That is not correct? A. No.

TRIAL EXAMINER: Maybe you mean to the east of the two entrances?

MR. ANSELL: Oh, all right. Let me rephrase it.

Q. (By Mr. Ansell) To the east of the two entrances that we have been referring to as 1125 East 17th Street there is an orange grove? A. Well, how far east?

104 Q. First of all there is an orange grove to the east? A. Well, it's past this here entrance (indicating).

Q. Let me ask you this question: Is there something that separates the two entrances that we have called 1125 East 17th Street from the dwelling, the house that we have called 1207? A. Yes, there is something.

Q. What is there that separates the two? A. It's some avocado trees.

Q. Avocado trees? What are they, rows of avocado trees? A. Yes.

Q. This dwelling, the house that we have referred to as 1207, what kind of a house is that; a two-story house or a one-story -- A. Oh, it's just a frame house. I didn't look at it particular. It's just a house.

Q. You didn't -- A. No.

Q. Do you know who lived in the house at that time? A. No, I don't.

Q. Did somebody live in the house during that time? A. Somebody lived there.

Q. Somebody lived there? A. But I don't --

Q. Do you know what that person's ownership interest in that
105 home was at the time; whether the person owned it or was renting it or what have you? A. Well --

Q. I mean, do you know for a -- A. He's just the caretaker for this property here (indicating).

Q. Oh, he is the caretaker?

MR. GRODSKY: Indicating what property? I am not there and I cannot see it.

MR. ANSELL: Yes.

Q. (By Mr. Ansell) What property are you indicating? A. Well, this little strip right in here (indicating).

TRIAL EXAMINER: Where the avocado trees are?

Q. (By Mr. Ansell) Where the avocado trees are? A. Yes.

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

Q. (By Mr. Ansell) Let me ask you one or two questions and then perhaps we can revise the stipulation. You know for a fact that it is an avocado bunch? A. Yes, I know for a fact.

Q. It separates the 1125 entrances from the dwelling or house at 1207 -- A. That's right.

* * * * * * *

109 Q. When you got onto the doctor's property way behind the house right straight back, would you find any structures of any kind or was 110 there just parking area? A. No, it's structures and parking area on both sides.

Q. Let me ask you this question: In the months of October and November of 1963 was the Mays Corporation doing any construction work in that area; namely, the area behind the house but far enough behind so that you get onto the land owned by the medical center?

TRIAL EXAMINER: The Medical Arts --

THE WITNESS: No, I wasn't doing any work in that particular area right where you would come onto it.

Q. (By Mr. Ansell) All right. Would it be a fair statement to say that your work --

TRIAL EXAMINER: Your construction work --

MR. ANSELL: Thank you.

Q. (By Mr. Ansell) That your construction work extended generally up to the start of the avocado trees? A. No.

Q. Would it extend up that far? A. No, sir.

Q. Did it extend further east than the avocado trees? A. Only when I put this fence in (indicating).

Q. All right.

TRIAL EXAMINER: When did you put the fence in?

THE WITNESS: Beg your pardon?

TRIAL EXAMINER: When did you put the fence in?

THE WITNESS: That was at a later date.

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112 MR. ANSELL: So stipulated. And that no picketing occurred after the 19th.

MR. GRODSKY: That is correct, I will so stipulate.

MR. ANSELL: All right.

TRIAL EXAMINER: That stipulation is accepted.

Q. (By Mr. Ansell) So then it is your testimony that sometime after the 19th of November you caused to be erected a fence which would mark off the outer limits of the Medical Center's property; is that correct? A. Yes.

Q. Incidentally, the road which was used as the private entrance, what was that; a dirt road? A. Yes. It might have had some gravel on it. I didn't ever travel it.

Q. As of November 18 and 19, how far east did your construction work go in reference to the avocado patch? A. Oh, it didn't go east and north, it went north.

Q. Was the --

TRIAL EXAMINER: In other words, the construction project did not extend as far east as the avocado grove?

THE WITNESS: That was the old property.

TRIAL EXAMINER: All right.

MR. ANSELL: All right.

TRIAL EXAMINER: I want to make sure that you understand my question --

* * * * * * *

116 THE WITNESS: Yes. The east side of that would probably come awfully close like up with --

TRIAL EXAMINER: The western side of the avocado grove?

THE WITNESS: The western side of the avocado grove.

TRIAL EXAMINER: But nonetheless the rest of the property was also part of the general property where the Medical Arts Building was being constructed?

THE WITNESS: That is correct.

TRIAL EXAMINER: Thank you.

MR. ANSELL: Let me ask you this: How far back in terms of feet or yards, if you know, would the road extend before you hit the Medical Arts property?

TRIAL EXAMINER: What road?

MR. ANSELL: Excuse me, the private entrance at 1207.

THE WITNESS: How far would it go north?

Q. (By Mr. Ansell) That is correct. How far north would one have to travel before he hit the medical arts property? A. I believe about -- probably 250 feet.

Q. 250 feet, all right. So that at some time after the events in question here, sometime after the picketing ceased, you set up a fence right at the southerly limit of the Medical Arts property? A. Yes.

Q. You do not recall when that was? A. Well, not exactly, but
117 I'd say it would be more apt to be up in the -- in December. Well, they didn't finish until January.

Q. Sometime in December, you think? A. I think that's when we put it in.

Q. Would December 12 refersh your recollection any? A. December the 12th.

Q. That is right? A. No, not to pin it right down to actually the date, it wouldn't, because I don't --

Q. All right. But it was sometime in December, though? A. They started sometime in December.

Q. So that when you put up that fence in December you effectively made it impossible for any employees to get on the jobsite by that means, that is, by means of this private entrance, is that correct? A. Well, they couldn't have gotten on -- they couldn't have --

Q. They couldn't get onto it, period? A. Yes.

Q. Let me ask you this: You told me that you do not know the name of the persons that lived in the dwelling. A. No, I do not.

Q. Did you ever talk to those persons at all? A. Yes, I talked to
118 the man there.

* * * * * * *

119 Q. Let me ask you this: Was there ever a time after November 18 when you observed Calhoun Drywall employees using the first two entrances; that is, the entrances at 1125 East 17th Street? A. Well, I didn't see them using them.

Q. You didn't see them using them? A. No.

Q. Let me ask you this, sir: The little sign that was set up that we have described, referring to the private driveway for Calhoun employees, that sign, that identical sign was placed on the 1125 entrances and the 1207 entrance, is that correct? A. Yes --

TRIAL EXAMINER: Well, there were two separate signs.

MR. GRODSKY: No, they are two separate signs.

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

Q. (By Mr. Ansell) Did there come a time after November 18 when the two signs that we are talking about, namely, those instructing the employees of other contractors to use 1125 and the sign instructing Calhoun's employees to use 1207, when those signs were lifted or removed? A. Yes, sir. Theywere removed --

Q. When that -- when did that happen, sir? A. Well, immediately after they -- I'd say about Wednesday.

120 Q. About Wednesday? A. Right.

Q. You mean Wednesday of the first week? A. Yes, after the -- the very next day. In other words, after the pickets were removed.

TRIAL EXAMINER: So I am clear --

MR. ANSELL: All right.

TRIAL EXAMINER: -- the picketing started on November 18 and the pickets were there on November 19 and it was on the next day, November 20 that the signs were removed from the entrances?

THE WITNESS: Yes, sir.

Q. (By Mr. Ansell) Now, you do not know -- A. I might -- I mean from the entrances on the west, I don't know when the one on the private entrance was removed.

TRIAL EXAMINER: All right.

Q. (By Mr. Ansell) You do not know whether those signs were both removed at the same time then? A. No, I know the ones in the main entrance there on the property were removed, but I don't know when the other was removed.

Q. By "the other one," you mean the one at 1207? A. That's correct.

Q. Incidentally, does the 1207 private entrance have any name on it? Was it named as a street? A. No.

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Q. Will you tell us in general what drywall work involves?
A. Well, if it was just a drywall -- you mean it would be just -- I suppose putting the sheetrock on and taping it and what have you.

Q. Let me revise the question. I think it might be fairer to you. Could you describe for us what Mr. Calhoun's contract required him to do in toto; namely, the drywall, the metal studs and the taping? Just what is it in connection with the building project that he was responsible for? A. Well, the metal studs, they use them in lieu of wood, you know, just to put up the partition --

Q. Yes. A. -- and they put the sheetrock on each side of it. Then they tape it and sand it down and get ready to paint.

Q. What is taping? What does that mean now? A. Well, the crack, you know, where the joints come together.

Q. Yes, I see. Now, you are talking about the frame now of these buildings -- A. Yes, the frame.

Q. -- aren't you? A. The frame from -- for the --

Q. He actually sets up the frames -- A. They did in this particular case.

Q. Was that the frames for all of the building structures on the
126 jobsite? A. All that building.

Q. All of just one building or -- A. This one building.

Q. And this is a medical building, is that right? A. Yes, sir.

Q. Were there anyother structures to go up on that jobsite beside this medical building? A. No, sir.

Q. So that actually the Calhoun Drywall Company would have to complete its operation before some of these other crafts came into process, is that right, like the elevators and the ceilings and the air conditioning? That would all come after Mr. Calhoun's part of the -- A. Not the elevators at all.

Q. -- operation had been complete? A. Not the elevators, they were already there.

Q. Theywere already there? A. They were in the concrete structure.

Q. I see. But the others were to come later on? A. Yes, inside the -- the drywall just consisted on the inside of the building. It was --

Q. I see. A. -- all concrete construction and cement plaster on all of the exterior.

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131 RECROSS-EXAMINATION

Q. (By Mr. Calhoun)

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135 Q. (By Mr. Calhoun) Did anyone from the Painter's Union, District Council No. 48 or the local union inform you that there would be labor trouble on the job --

MR. ANSELL: That is --

Q. (By Mr. Calhoun) -- if Calhoun's employees came on?

* * * * * * *

Q. (By Mr. Calhoun) Do you recognize any of the people in this room today who informed you of this? A. Yes.

136 Q. Would you point him out, please? A. This gentleman over here (indicating).

MR. CALHOUN: This gentleman over here (indicating) -- I believe his name is --

MR. ANSELL: Well, I will stipulate for the record that his name is Bill Seaquist.

TRIAL EXAMINER: And that is the person who has been identified by this witness?

MR. ANSELL: That is correct.

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FURTHER RECROSS-EXAMINATION

Q. (By Mr. Ansell)

* * * * * * *

137 MR. ANSELL: Yes.

Q. (By Mr. Ansell) Did they do any work at all on the 18th or 19th in fact? Were they on the jobsite at some time? A. They came down there, but I really don't think they did any work. They might have started, but they --

TRIAL EXAMINER: On each date?

THE WITNESS: On each date.

Q. (By Mr. Ansell) All right. A. But I am not positive if they even started.

Q. But they were on the jobsite? A. They were there.

Q. Do you recall whether the pickets stopped the picketing after they left the job site on those days? A. Yes, they stopped picketing when they would leave.

Q. When they left on the 18th or 19th, all right. Just one other question. The work that was assigned out to Mr. Calhoun under his contract, the taping work, the drywall work, this is necessary work that is performed by somebody in connection with every construction project, is it not? A. Oh, yes.

Q. All right. Do you recall when you had a conversation with Mr. Seaquist? A. Yes.

138 Q. When was that? A. I can't recall the date, but I was over across 17th Street on the south side of the street at another job we were doing and he and some other gentleman came over there and asked me -- and informed me that those men that were working for Calhoun were out of District 50 and if we didn't get it straightened up that he would have the pickets on the job.

Q. That was Mr. Seaquist that said that? A. And somebody else. I don't know who it was that was with him. There was two of them.

Q. But you recall Mr. Seaquist speaking too? A. I don't know which one of them did the talking, but he was one of the two men that was there.

Q. Do you recall anything else was said? A. No, I don't recall anything else that was said because that was the first I knew anything about it, and it kind of got me.

Q. When you say it was the first thing you knew about it, that is, the first you knew of Mr. Calhoun's labor relations, is that right.
A. That is right.

Q. Do you recall Mr. Seaquist or the other gentleman making reference to the fact that Calhoun operates at wage levels and fringe benefit levels below those objected -- obtained --

MR. CALHOUN: I object to the question. It is leading and
139 suggestive.

MR. ANSELL: It is not finished yet.

TRIAL EXAMINER: Please permit counsel to state his question and then I will hear your objection.

Q. (By Mr. Ansell) Let me start again, Mr. Mayes to help you. Do you recall a statement being made by either Mr. Seaquist or his companion to the effect that Mr. Calhoun paid his employees at wage rates and fringe benefit levels below those contained in the Painter's agreement and therefore he was substandard and that therefore it might be necessary to take economic action in that regard?

TRIAL EXAMINER: Do you object, Mr. Calhoun?

MR. CALHOUN: Yes, I do.

TRIAL EXAMINER: What are the grounds?

MR. CALHOUN: Oh, leading and suggestive.

TRIAL EXAMINER: Objection overruled.

THE WITNESS: I don't believe they informed me about the wages.

Q. (By Mr. Ansell) You don't -- A. They just said that they were District 50 men and were not in the building trades and that something would have to be done about it and the exact wording of the conversation I don't -- I couldn't tell you exactly what it was.

Q. In other words, you do not recall everything that was said by
140 these men on that occasion? A. No, sir, I don't recall everything that was said.

Q. At the time that they engaged you in this conversation, what were you in the process of doing, if you recall? A. Well, I was over on our other job talking to the -- the other superintendent on another job.

Q. You were right in the middle of your conversation with this other superintendent when these two fellows came up, is that right? A. I had been talking his -- to him, yes.

Q. When your conversation with Mr. Seaquist and his companion finished, you went back to talking to the other supervisor? A. No, I don't believe I did.

Q. Do you recall what you did do? A. Well, I went back over to my own job.

Q. Did you deal with the Calhoun matter as soon as you got back to your old job or was there something else that occupied your time? A. No, I didn't deal with it then at all.

Q. All in all, how long was your conversation with Mr. Seaquist and his companion, if you recall? A. Oh, I don't know. I'd say probably five minutes or something like that.

141 Q. About five minutes? A. It was just a --

Q. At this time what you can recall him saying during this five-minute conversation is that Calhoun is assigned to District 50 and that pickets would go on if the thing wasn't straightened out? That in substance is what you recall? A. He said something would have to be done about it or there would be some trouble.

* * * * * * *

150 FURTHER RECROSS-EXAMINATION

Q. (By Mr. Ansell)

156 Q. Directing your attention to the conversation you had with Mr. Seaquist shortly before the picketing started back in October, October 30, did you say to you that if the matter about Frank Calhoun wasn't straightened up there might be economic action taken against Frank Calhoun? A. Well, the thing I interpreted it to be --

TRIAL EXAMINER: No, just answer that question, not what you interpreted.

Q. (By Mr. Ansell) Do you recall him saying that, sir? A. I don't recall the exact words.

Q. Do you recall him using the words "economic action"? A. No, I don't recall that.

Q. Do you actually have a recollection of what words he did use? A. No, I don't.

Q. I see. Did you get the impression from what he said that something might be done -- A. Yes.

Q. -- if the matter about Frank Calhoun wasn't straightened out? A. Yes, sir.

Q. And you interpreted that to mean picketing, is that right? A. I interpreted that to mean pickets.

* * * * * * *

174 FRANK A. CALHOUN

was recalled as a witness by and on behalf of the General Counsel and, having been previously duly sworn, was examined and testified further as follows:

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207 TRIAL EXAMINER: "11:11 p.m."

MR. ANSELL: Yes.

Q. (By Mr. Ansell) Do you know the day that was sent? A. Yes, this was --

Q. Or the night? A. Yes, on Sunday night, the --

Q. Sunday night? A. Yes.

Q. I see. A. As a night letter on, I believe it would be, November the 17th.

TRIAL EXAMINER: The 17th was a Sunday?

THE WITNESS: Yes, November the 17th.

Q. (By Mr. Ansell) It was sent at 11:11 p.m. then on Sunday, November 17, is that right? A. I believe so. I believe it was.

Q. All right. A. To the best of my knowledge.

Q. Did you have any other communication, either written or oral, with representatives of District Council 48 about the setting up of this separate entrance other than this telegram or night letter? I mean a conversation that took place either that day or earlier than the 17th or the 18th or the 19th of November; just within that period. A. I don't recall any.

208 Q. All right, okay.

TRIAL EXAMINER: May I be clear on this?

MR. ANSELL: Surely.

TRIAL EXAMINER: Did you have any communication with any representative of this Respondent? You know who the Respondent is here, this union? Did you have any communication of any kind, sort, or description other than this telegram, GC4?

THE WITNESS: Oh, yes.

TRIAL EXAMINER: Before November 19?

THE WITNESS: Yes.

TRIAL EXAMINER: All right.

Q. (By Mr. Ansell) My question was limited to the setting up of this -- well, let me withdraw that.

In GC4 the union was advised as to the setting up of this private entrance, is that correct, that was the reason for the sending of the telegram -- A. Yes.

Q. -- to bring this to their attention? A. Yes.

Q. Did you bring this same subject to the union's attention at anytime prior to the 18th or 19th of November?

MR. GRODSKY: Do you mean in connection with this job?

MR. ANSELL: This particular job and this particular private
209 entrance, that is right.

* * * * * * *

212 RECROSS-EXAMINATION

Q. (By Mr. Ansell)

* * * * * * *

224 TRIAL EXAMINER: Do you know of your own knowledge whether that road at 1207, which, as I understand the testimony, was immediately adjacent to and east of this house, whether that was private property?

THE WITNESS: Yes, it was.

* * * * * * *

224 TRIAL EXAMINER: The objection is overruled. Do you know who owns that road?

THE WITNESS: Yes, sir, the -- I talked to the owner. I first approached the people who lived in the house and told them that I was --
225 Mr. Sabatino was with me, and we informed them of the situation and of the picketing and what our purpose was and asked him if we could get permission to use the road as an entrance to the Medical Center and

he -- the caretaker in the house referred us to the man who owned the property. I do not recall his name right at this moment.

TRIAL EXAMINER: Anyway he told you somebody --

THE WITNESS: Yes.

TRAIL EXAMINER: -- in particular owned the property?

THE WITNESS: Yes.

TRIAL EXAMINER: -- in particular owned the property?

THE WITNESS: Yes. We went out and saw this man and asked him if we could use the road to -- as a separate entrance to the Medical Center property and he said that we could.

TRIAL EXAMINER: Any questions, Mr. Grodsky?

MR. GRODSKY: No questions.

TRIAL EXAMINER: Mr. Ansell?

Q. (By Mr. Ansell) You do not know what this man's name is?

A. I have a record of it somewhere. I don't know what it is offhand.

MR. ANSELL: No further questions.

TRIAL EXAMINER: Thank you very much, sir, you may be excused.

MR. ANSELL: May I note an objection, though, and move to strike the answer as being not responsive to your question, Mr. Trial Examiner? You asked him if he knew and to the extent of his knowledge --

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* * * *

228

WILLIAM W. SEAQUIST

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

* * * * *

DIRECT EXAMINATION

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229

TRIAL EXAMINER: Earl Mayes?

MR. ANSELL: Mr. Earl Mayes.

THE WITNESS: Yes.

Q. (By Mr. Ansell) Was that at a job across the street from where this particular job was going on? A. That's right.

Q. Was somebody with you? A. That's right.

Q. Who was that? A. Mr. Calmer Hanson.

Q. And he is also a business representative? A. A business representative for District Council of Painters 48.

Q. Will you tell us what the conversation was?

TRIAL EXAMINER: When was the conversation; how long before November 18, if it was before November 18?

Q. (By Mr. Ansell) How long before October 30 was this conversation? A. It was, I think, on October 30th.

Q. The same day -- A. I think it was on the same day. I'm not positive.

Q. The same day as the picketing began? A. Previous -- no, it was a day previous.

Q. You think it was a day previous? A. That's right.

230 Q. Well, it has been established and admitted that the picketing began the 30th of October. A. That's right.

Q. Then your best recollection would be that it would be about the 29th, is that right? A. That's right.

Q. Would you tell us what was said? A. Well, do you want me to brief it or would you want me to go through the whole thing so that --

TRIAL EXAMINER: Just tell us what was said in connection with this picketing at this jobsite if anything was said --

Q. (By Mr. Ansell) That is right. A. I approached --

TRIAL EXAMINER: -- by you and Mr. Hanson.

THE WITNESS: I approached Mr. Mayes on the job across the street from the Medical Building and told Mr. Earl Mayes, that is, that he had a District 50 contractor on his job in the Medical Building and that he had a contractor that was unfair to our Orange County Building Trades Agreement.

Q. (By Mr. Ansell) Did you explain what you meant by that? A. Well, not being signed with our organization.

Q. Was that all you said? A. Building Trades. I then stated that -- I'm trying to think of the words so I don't put something in here that I

231 didn't say. I stated that I hoped that he could get it straightened out other than put -- probably have to be economic action taken on his job. That's what -- the words I used.

Q. Let me ask you this: Did you use the name of Frank Calhoun?

MR. GRODSKY: Excuse me, may I have that answer read back?

TRIAL EXAMINER: Surely.

MR. GRODSKY: I didn't quite get it.

TRIAL EXAMINER: That is all right. Would you please read it, Mr. Reporter?

(Answer read.)

Q. (By Mr. Ansell) Did you make any further explanation to -- well, let me ask you first of all: Did you mention Mr. Calhoun's name? A. No, not at that time. I mentioned -- after I left Mr. Mayes I walked back to my car and Mr. Hanson walked with me. I got back in the car and then I thought for a moment. I didn't mention -- or didn't ask him specifically the contractor's name. I then went back to Mr. Mayes and said, "Who is the drywall contractor on this job?" He said then, "Frank A. Calhoun." I thanked him and left.

Q. When you talked to him the first time, you mentioned this
232 District 50 Painting -- the drywall contractor, did you believe that it was Calhoun at that time? A. I knew it was.

Q. Oh, I see. Well, then, what was the purpose of your going back and asking him a --

Q. To hear it from him specifically that it was.

Q. You wanted to make sure? A. That's right.

Q. Did you explain in anygreater detail as to what your dispute was with Mr. Calhoun other than the fact that he wasn't signed to your agreement? Was there anything else said? A. Notning else.

Q. Was there anything said regarding wages -- A. Well, regarding the substandard working conditions. There was a remark made -

Q. Well, tell us what was said. A. -- I'm sure. That the District 50 organization works under a substandard working condition. I can't be sure about the wages, but I am sure about the fringe benefits.

TRIAL EXAMINER: You mean you cannot be sure whether you mentioned wages --

THE WITNESS: No, no.

TRIAL EXAMINER: Oh --

THE WITNESS: No. I can't be sure about what the wages are in
233 District 50, but I am sure about the fringe benefits.

TRIAL EXAMINER: Is that what you said to Mr. Mayes?

THE WITNESS: No, no; I didn't say that.

TRIAL EXAMINER: I just want to know what you said to Mr. Mayes.

THE WITNESS: No, I just stated that he worked under substandard working conditions.

Q. (By Mr. Ansell) You said that to Mr. Mayes? A. That's right.

Q. Did you make any comparison when you talked to Mr. Mayes between the District 50 contract and the Painters Agreement? A. No, no.

Q. Did Mr. Mayes say anything to you? A. Mr. Mayes said he would try and get it straightened out or -- let me state that another -- in other words he said that he would try to take care of it.

Q. So then you left? A. I left, that's right.

Q. Did you come back again later? A. I came back the following day on the jobsite, but I did not speak to Mr. Mayes.

Q. Did you observe something? A. I -- what do you mean by "observe." Do you mean --

Q. Well, why did you come back the second time? A. Well, just to see if my pickets were on that job.

234 TRIAL EXAMINER: And were they, or weren't they?

THE WITNESS: They were on the job.

* * * * * * *

235 Q. The next morning -- A. The following day.

Q. Do you mean after -- the day following this initial conversation with Mr. Mayes, which would be the day picketing began, or was it the day after picketing began. A. The day following the conversation with Mr. Mayes.

TRIAL EXAMINER: So it was the day the picketing began?

THE WITNESS: Yes.

Q. (By Mr. Ansell) All right, but were you contacted then the following day before any pickets were set up? A. That's right.

Q. Were you advised that Mr. Calhoun's men were on the job?

THE WITNESS: Yes.

Q. (By Mr. Ansell) All right, but were you contacted then the following day before any pickets were set up? A. That's right.

Q. Were you advised that Mr. Calhoun's men were on the job?

A. That's right.

Q. And did you give some kind of instructions at that time?

A. Instructions to whom?

Q. As to picketing. A. Was I given instructions?

Q. Did you give some instructions? A. Oh, did I give instructions to picketing?

Q. Yes. A. Yes. I told the pickets not to march on the job unless they definitely -- if Calhoun's men were on the job.

Q. Did you give them any other instructions as to how to picket?

A. Not to make any conversation with anyone.

* * * * * * *

237 MR. ANSELL: All right, I appreciate that. Obviously what he says to the picket is not binding, naturally --

TRIAL EXAMINER: That wasn't your question. The question was, what did you tell the pickets about why you handed these things out, as I recall your question. It was why did he give these to the pickets.

MR. ANSELL: All right. The relevancy I think is this: It is important to show his frame of mind because ultimately, Mr. Trial Examiner, you will have to determine this union's objective in its picketing operation. Were they advertising a problem to the public and to Calhoun's employees?

TRIAL EXAMINER: Read the question, please.

(Question read.)

TRIAL EXAMINER: I reverse my ruling. The objection is overruled. You may answer.

THE WITNESS: Well, the pickets, as a rule, will try to explain if they can -- explain completely the problems on a job. At times, it can be, in a sense -- I am trying to find the words -- misinterpreted of what they are saying. They might in time say to a party the reasons for the picketing and this party would misinterpret their saying and it would be brought out later on that the man did not say that he said this, so we are very careful
238 to instruct our pickets not to talk about anything, to make sure that they definitely don't say anything about the job to anyone, but to give them a slip of paper and if they want to know anything they could contact our District Council office and they will find out anything they want to know.

Q. (By Mr. Ansell) Let me ask you this: The picketing began on the 31st of October, is that correct?

TRIAL EXAMINER: The 30th.

Q. (By Mr. Ansell) The 30th -- A. That's correct.

Q. -- of October? And there were two pickets set up, is that right? A. Right.

Q. Who would traverse the two entrances at 1125 -- A. That's right.

Q. What was the purpose of the picketing? A. The purpose of the --

MR. GRODSKY: I will object. It is going to be selfserving. The facts will speak for themselves.

MR. ANSELL: Oh, well --

TRIAL EXAMINER: Objection overruled.

THE WITNESS: The purpose of the picketing namely -- mainly was to advise anybody going in that particular job or area, workers even for Mr. Calhoun that they are working under a substandard working condition.
239 That's the purpose of that picket sign.

Q. (By Mr. Ansell) To whom was it you were directing your appeal? A. To mainly the employees of Mr. Calhoun.

Q. Anybody else? A. To the workers on the job and to the people that go in and out of that area.

Q. You mean to the people going to the doctors' offices and coming to the drugstore? A. Sure, anybody.

Q. Well, are you talking about other workers at work or are you -- A. Speaking about the other crafts on the job.

Q. What was it you wanted to convey to them? A. Wanted to direct their attention to the fact that Mr. Calhoun's men were working under substandard working conditions.

Q. Was it your objective to persuade employees of other contractors to stop work? A. No, sir.

MR. GRODSKY: I will object, Mr. Examiner. I just want to make my record. May I have a standing objection if this one is overruled?

TRIAL EXAMINER: Yes. I will overrule the objection. You have
240 a continuing objection concerning these questions which you consider to be completely self-serving, such as asking the witness what he was trying to do, et cetera. You have a continuing objection.

MR. GRODSKY: All right.

MR. ANSELL: All right.

Q. (By Mr. Ansell) Were you appealing to the employees of Frank Calhoun to stop work? A. No, never told them at any time to stop work.

Q. No, by your picketing? A. In a sense we would be--

Q. All right. And you were also appealing to persons doing business on their -- that is, consumers or people going to the doctors' offices and so forth? A. That is correct.

Q. Was there anything that you wanted the employees of the other contractors to do by means of this picketing? A. Not specifically, no.

Q. All right. Now --

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

Q. (By Mr. Ansell) When the picketing began, were there many people coming to the drugstore doing business in and about the building --
241 A. I'd say yes.

Q. -- and other structures out there? A. That's right.

Q. Was it a fairly busy place? A. Yes.

Q. You were appealing to those people? A. That's right.

Q. Did you ever receive this telegram, GC No. 4 at any time before the 18th of November? A. I never saw that telegram until here.

Q. Until when? A. Until here.

Q. Until this proceeding began? A. That's right.

Q. That is, until today? A. Yes.

TRIAL EXAMINER: Well, whenever it began --

THE WITNESS: That's right.

TRIAL EXAMINER: -- you never saw that until today?

THE WITNESS: That's right.

TRIAL EXAMINER: You never saw a copy of it?

THE WITNESS: No, sir, that's right.

TRIAL EXAMINER: You never saw anything that looks like it?

242 THE WITNESS: That's right.

* * * * * * *

243 Q. Let me ask you this: Did you say anything to the picket who tele-
244 phoned you on the morning of the 18th? In other words, when the picket called you in the morning and said to you that a separate entrance had been set up -- is that right? A. That's right.

Q. And he told you about the signs -- A. Yes.

Q. -- is that correct? A. That's right.

Q. And he told you where the separate entrance was? A. That's right.

Q. Now, once delivering that information to you, did you say anything back to the picket whether to -- A. In that phone conversation?

Q. Yes, in that phone conversation. A. I didn't -- well, now, I am trying to think back now. "To be careful where we picket," something like that, to stay where we were supposed to stay.

Q. Specifically, did you tell him whether to remove his pickets over to that private entrance? A. No, I did not.

Q. Did you tell him to remain on the entrances that he was picketing? A. That's right, remain on the entrance.

Q. Did you give him any reason for that? A. Well, I think I mentioned something about being careful that we don't want to picket
245 on a private residence.

Q. Let me ask you this question: In your own mind as you think back upon it, do you know why you made the decision to keep the picketing going on at the 1125 entrance rather than to move them over to the 1207 entrance? A. Yes.

Q. All right, tell us why. A. We could be in a very bad situation. I felt if we would picket a residence where there would be people living we could be in a criminal suit, civil suit, and if someone is not well in that home and they see a picket walking up and down in front of this house, not knowing myself if they knew about it, we could establish you see -- ourselves, and put ourselves in a very, very fine kettle of fish, so to speak.

Q. This was the reason why you made the decision -- A. That's right.

Q. -- to picket where you did? A. That's right.

Q. Well, let me ask you this question: When you received this information on the 18th of November, did you have any knowledge as to whether patrons of the medical center or the other buildings around there, the drugstore or the people otherwise coming on and doing business, whether they used that private roadway or not, that private entrance?
246 A. You mean if they used the private entrance?

Q. Yes. Did you have any knowledge as to whether those persons used the 1207 entrance or did they use the two entrances at 1125? A. I couldn't specifically say if they used the private entrance or the main entrance. I wasn't watching them.

Q. Do you have any belief on this subject? A. Well, in my mind I wouldn't think they'd use the private entrance.

Q. Did that enter into your judgment at all as to the fact that you -- A. That's right.

Q. -- your pickets wouldn't reach those people? A. That's right.

Q. Your pickets would not reach them if you picketed the private entrance? A. Private entrance, that's right.

Q. So you picketed the main entrances? A. The main entrances, yes.

Q. Let me ask you this: Did you give your pickets some instructions as to picketing when Calhoun's employees were on the job or off the job? A. That's right.

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CROSS-EXAMINATION

247 Q. (By Mr. Grodsky) Mr. Seaquist, now, I understand that your purpose in picketing was to advise whoever would read the picket sign that Calhoun's employees were working under substandard working conditions. A. Right.

Q. And your appeal was directed in part to the employees of Calhoun? A. That's right.

Q. What was your appeal to them? What did you expect to do about it? A. This I can't answer, what they would do. There have been times when people have contacted us and asked us, "Where do you find that it is substandard?" But nobody contacted me to ask. I --

248 Q. In other words, it was your expectation that employees of Calhoun would contact you? A. Possibly.

Q. Was it your expectation that they would stop working under the substandard conditions? A. I could hope so.

Q. Now, you say that the picketing was also an appeal to the customers of the various -- that is, the various patients of the various doctors and persons coming to buy medicines on the job. A. Just notifying them of the fact.

Q. What did you expect to accomplish by that? A. I couldn't say.

Q. Did you think that they had any more interest in it than the people in downtown Santa Ana would? A. What do you mean by --

Q. People, say, three blocks away from the job. A. Well, I would say that anyone is interested in the working conditions of the working man.

Q. You did not picket three blocks away from the job, did you? A. No, because that particular jobsite was the site where they were working.

Q. Then you were picketing it where -- because it was a
249 jobsite and not because you wanted to appeal to customers?

MR. ANSELL: I am going to object to that on the grounds the question is too vague and indefinite and it is argumentative in form, too.

TRIAL EXAMINER: I will sustain on the last ground. Reframe your question, Mr. Grodsky.

Q. (By Mr. Grodsky) Your appeal to the employees of other employers or other subcontractors' employees was that different than your appeal to Calhoun's employees? A. Basically, it was not an appeal to them. It was mostly an appeal to the employees of Frank Calhoun.

Q. Yet you testified, did you not, that when you knew that Calhoun's employees were using this private entrance you continued to picket at the entrance that they were not using because you felt that by picketing at the private entrance you would not be able to appeal to the customers.

A. That's right.

Q. So that you were appealing not only to the employees of Calhoun but to the employees of other contractors and to the customers --

A. Don't say --

MR. ANSELL: Just a moment, I am going to object to that on the grounds it misstates his previous testimony.

TRIAL EXAMINER: The objection is overruled. He can state that
250 that is or is not so. Do you remember the question?

THE WITNESS: Yes. I -- mostly it was meant as an appeal to the people other than the employees of other contractors on the job.

Q. (By Mr. Grodsky) You were notified on Monday, the 18th, in the morning, that a separate entrance had been set up for Calhoun's employees? A. That's right.

Q. Did you communicate with your attorney to determine what change, if any, you should make in your picketing? A. I did not.

Q. You made the decision to continue picketing at the general entrance and not picket the reserve gate on your own? A. Well, you might say that not getting information from any other source, my District Council.

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252 FURTHER CROSS-EXAMINATION

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255 Q. (By Mr. Calhoun) What did you expect Earl Mayes to do as a result of your conversation with him when you notified Earl Mayes that a
256 District 50 contractor was on the job and that District 50 was not affiliated with the Building Construction Trades Council? And when you told him that you hoped that he could get it straightened out so that you wouldn't have to take economic action? What did you expect Earl Mayes to do? A. Get it straightened out. I can't say what he would do to get it straightened out. I can't expect to -- to have him do something that I would -- I wouldn't know what he was going to do.

Q. What did you want him to do? A. Well, I would say get a contractor on the job that was a fair contractor as far as we are concerned.

Q. What did you determine to be a fair contractor? A. A man that pays the standard wage, the fringe benefits.

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294 SID PRALL

was called as a witness by and behalf of the Charging Party and, having been first duly sworn, was examined and testified as follows:

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295 DIRECT EXAMINATION

Q. [By Mr. Ansell] You are a member of the Painters Union, are you? A. I am.

Q. Have you ever done picketing at the job site in question? A. I have.

* * * * * * *

296 Q. All right. Let me ask you this question. You picketed before that time, too? A. Yes.

Q. All right. Before you started picketing, were you given any instructions by any representative of the Painters Union? A. Yes.

Q. And who gave you instructions? A. Bill Seaquist.

Q. All right. What were those instructions? A. Those instructions were to be very careful that we did not picket until Calhoun's men were on the job site, and we were given some slips of paper that, in case we were approached and questioned by anyone, we were to hand them the slip of paper. We were to have no conversation with anyone.

Q. Let me show you General Counsel's 5, and I will ask you if that is the slip of paper that you were given? A. Yes, sir.

Q. All right. Now, were you to stop picketing when the Calhoun men left the job? A. Yes, sir.

Q. All right. Now, you saw the signs being posted about the separate entrance for the first time, did you? A. No, sir.

Q. Oh. When did you first become aware, then, that there was a
297 sign, that Calhoun employees should use a separate entrance? A. When we arrived there at the job site to start picketing on the Monday morning when the signs were in place.

Q. They were already up when you arrived there? A. They were in place, yes.

Q. What did you do when you saw that? A. We went back to the job site to see if Calhoun's men were there, and if they were working.

Q. All right. And were they? A. They were.

Q. What did you do then? A. We went to the telephone and called the local union for instructions whether to picket or whether not to picket.

Q. You say "We." Who was with you? A. Mr. Piatrofsky.

Q. All right. And you went -- Did you go on the job site to use the telephone? A. No.

Q. Where was the telephone? A. The telephone was in the drug-store which is immediately in front of the job site.

Q. In front of it? All right, and did you get one of the agents on the phone? A. I did.

298 Q. Mr. Seaquist? A. That is right.

Q. And did you describe to him the signs? A. I did.

Q. Did you tell him where the entrance was that the Calhoun employees were to use? A. I did.

Q. All right. In particular, did you describe the --

MR. GRODSKY: Just a minute. Wait a minute. I am going to start objecting at this point.

TRIAL EXAMINER: All right. Objection sustained. It's a leading question. I assume that is the basis of the objection?

MR. GRODSKY: Yes.

Q. [By Mr. Ansell] You did describe where that private entrance was? A. I did.

Q. All right. What, if anything, did Mr. Seaquist say to you?

A. He said, "By all means do not picket that private entrance." He said we might get involved in questionable procedures. That was his words, "questionable procedures."

Q. All right. And so you went back and continued picketing at the main entrances? A. Yes.

299 Q. Now, while you were out there picketing on those days, and other days, did you observe persons coming onto the premises and off the premises who were not dressed in workmen's clothes? A. Yes, sir.

Q. Were there many of them? A. Quite a few.

Q. Did you -- On the two days when the signs for the private entrance were up, ever see any persons other than Calhoun employees using that private entrance? A. Yes, sir.

Q. You understand the question? A. I do.

TRIAL EXAMINER: You know the private entrance?

THE WITNESS: That's right.

TRIAL EXAMINER: What are the persons you observed?

THE WITNESS: Apparently persons living in the house would occasionally go in and out and park immediately in the rear of the house.

Q. [By Mr. Ansell] You would see this? A. Yes.

MR. ANSELL: All right.

TRIAL EXAMINER: Anyother persons?

THE WITNESS: No, sir.

Q. [By Mr. Ansell] All right. Did you see persons dressed in other
300 than workmen's clothes using the two main entrances, going on the premises and off the premises? A. Yes, sir.

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TRIAL EXAMINER'S DECISION

Statement of the Case

Upon a charge filed by Frank A. Calhoun (herein Calhoun) on November 20, 1963 and amended January 9, 1964, the General Counsel of the National Labor Relations Board (herein the Board) issued a complaint, dated February 10, 1964, alleging that Orange Belt District Council of Painters No. 48, AFL-CIO (herein Respondent) violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended, (herein the Act).

Pursuant to due notice, a hearing in this matter was held before me at Los Angeles, California, on April 3, 23 and 24, 1964. The parties fully participated and their briefs have been received and considered.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The businesses of the employers

Involved herein is the building and construction industry and especially incidents occurring at a jobsite where a medical arts building was being constructed at Santa Ana, California (herein the jobsite). The particular issue relates to Respondent's primary dispute with Calhoun and Calhoun's work as subcontractor at the jobsite.

Calhoun is engaged in San Bernardino, California, as a drywall contractor in the building and construction industry. During the fiscal year, commencing July 1, 1962, Calhoun performed construction work valued in excess of $19,000 at military projects and Department of Defense installations in California and has received goods and materials directly from outside California valued at substantial amounts.

Cecil Mays Construction Co. (herein Mays) is a general contractor in the building and construction industry in California. At all material times he has been constructing the medical arts building at the jobsite.

Industrial Electric (herein Industrial), Pacific Plumbing (herein Pacific) and Carrara Marble Co. (herein Carrara) are engaged as electrical contractor, plumbing contractor, and marble contractor, respectively, in the building and construction industry.

Mays undertook at the jobsite to perform part of the work with his employees and subcontracted drywall work to Calhoun, electrical work to Industrial, plumbing work to Pacific and exterior marble work to Carrara and other work to other subcontractors.

The subcontractors on the jobsite, including Air Conditioning Company, Inc.,[1/] purchased directly from outside of California materials and products valued in excess of $50,000, for use on the jobsite.

[1/] In substance, stipulated to be one of Mays' subcontractors, at all material times.

Calhoun, Mays, Industrial, Pacific, Carrara and Air Conditioning Company, Inc., are and each is and at all material times has been engaged in commerce or in an industry affecting commerce and is and has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. [2/]

II. The labor organization

At all material times Respondent has been a labor organization within the meaning of the Act.

III. The unfair labor practices [3/]

A. Background

The jobsite faces on East 17th St., in Santa Ana. It is a rectangle, about 619 x 1,000 feet, a smaller rectangle, about 100 x 250 feet, being carved from the southeastern portion thereof. Upon the smaller rectangle there is on the western side, an avocado grove, and to its east a private house, with some space, variously used, to the rear, and at its easternmost part, a so-called "private" or dirt and gravel road for use by the owner of the smaller tract. [4/] The private road, when entered from East 17th St., led directly to the jobsite.

Respondent has had, at all material times, a labor dispute with Calhoun. Respondent has had no labor dispute with Mays or any of his subcontractors other than Calhoun. Calhoun has had no agreement with Respondent.

Calhoun's employees were working on the jobsite before October 30, 1963. [5/] Shortly before picketing began on October 30, Bill Seaquist,

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[2/] Siemons Mailing Service, 122 NLRB 81; Dennehy Construction Company, 111 NLRB 1025.

[3/] In finding facts herein I have generally credited the testimony of Calhoun and Earl Mays whose respective demeanors impressed me favorably. As to many of the facts there is little or no dispute.

[4/] At all material times the house was occupied by a caretaker.

[5/] Hereinafter all dates refer to 1963.

Business Representative of Respondent, and in charge of picketing at the jobsite for Respondent, told Mays' superintendent,[6] in effect and substance, that Calhoun was unfair and had not signed with Respondent. Seaquist added he hoped Mays could "get it straightened out other than put--probably have to be economic action taken on his job."[7] Picketing began October 30. Then and at all material times thereafter, the picket signs read:

> Frank A. Calhoun IS UNFAIR and operates under Sub-Standard Working Conditions. District Council of Painters No. 48.

During the October 30 picketing, employees of the subcontractors, other than Calhoun, left the jobsite because of the signs. Mays instructed Calhoun's employees to leave, the picketing stopped, and the subcontractors' employees returned to work. A few days later, substantially the same recurred.

All picketing took place at 1125 East 17th St., where there were two apparently adjacent entrances, hereinafter referred to as the main entrance or main gate.

General Counsel does not allege and I do not find the above described picketing to be violative of the Act.

B. November 17 and 18 and 19

Calhoun sent a night letter over Mays' signature and with the latter's approval, to Respondent on November 17. The night letter read:

> DISTRICT COUNCIL OF PAINTERS NO. 48
> 6370 MAGNOLIA AVENUE
> RIVERSIDE CALIFORNIA
>
> AND
>
> LIONEL RICHMAN
> 6700 WILSHIRE BOULEVARD
> LOS ANGELES CALIFORNIA
>
> YOU ARE HEREBY NOTIFIED THAT CALHOUN DRYWALL COMPANY AND HIS EMPLOYEES ARE NO LONGER PRIVILEGED TO USE THE ENTRANCES AT 1225 EAST 17th STREET SANTA ANA FOR INGRESS AND EGRESS TO THE MEDICAL ARTS

---

[6] Earl Mays.

[7] This is Seaquist's testimony. Crediting Earl Mays, as I do, I find Seaquist also said there would be labor trouble if Calhoun's employees come on the job.

CONSTRUCTION PROJECT. A PRIVATE ENTRANCE FOR THE SOLE AND EXCLUSIVE USE OF CALHOUN AND HIS EMPLOYEES TO THE CONSTRUCTION PROJECT HAS BEEN ESTABLISHED AT 1207 EAST 17th STREET REQUEST THAT YOU CEASE PICKETING THE ENTRANCES TO 1225 EAST 17th STREET.

CECIL MAYS, GENERAL CONTRACTOR
1111PM

On the morning of Monday, November 18, Mays, either directly and/or through Calhoun, caused the following sign to be plainly and conspicuously posted at the "main" entrance:

> Employees of all subcontractors use this entrance except employees of Calhoun Dry-Wall Co. who will use the private entrance at 1207 East 17th Street. Cecil Mays, Contractor.

Simultaneously, there was similarly posted at the private entrance, the following sign:

> This private entrance for sole use of Calhoun Dry-Wall employees. All other subcontractors' employees use entrance on 1125 East 17th Street. [8/] Cecil Mays, Contractor.

Calhoun credibly testified he had proper permission to use the private entrance. There is no evidence that Respondent ever inquired of the owner or the caretaker of the smaller tract or the house thereon whether picketing of the private entrance was permitted.

On November 18 and 19, Calhoun and his employees used only the private road or reserve entrance. Employees of Mays and the subcontractors other than Calhoun used only the main entrance, as did customers or suppliers of the drug store in operation on the jobsite and pateints of doctors who were practicing thereon.

Despite Calhoun's night letter, and the signs at the main and private or reserved entrances noted above, Respondent picketed only at the main entrance and not at the private road or reserve entrance, on November 18 and 19. The picketing occurred at the main entrance when Calhoun's employees were on the job and ceased when they left. Respondent's pickets

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[8/] The main entrance.

disregarded and refused Calhoun's personal invitation to picket at the reserved gate or private road during November 18 and 19 as they declined his simultaneous request to cease picketing him and his employees at the main entrance which neither he nor his employees were using.[9/]

Seaquist was told on November 18, by one of the pickets, that a private or reserve entrance had been established and the signs at the main and reserve entrances were described. Seaquist told the pickets *not* to picket the private entrance because Respondent might get involved in "questionable procedures."[10/] The picketing occurred at the main entrance when Calhoun's employees were working on the jobsite. Employees of other subcontractors either did not report for work during the picketing or left the jobsite. The only employees who worked were those of Mays and Calhoun. On November 19, Mays directed Calhoun's employees to leave the jobsite until the labor dispute was settled because the job was being delayed. Calhoun's employees left the jobsite and remained away from it until Respondent entered into an agreement not to picket pending disposition of this proceeding.[11/]

During all picketing, even though asked questions, the pickets refrained from speaking and gave to persons making inquiries, written notices directing members of the Painters Union to contact Respondent and members of other crafts to consult their own unions. Seaquist admitted that the picketing was directed not only to Calhoun's employees and the public but also "to the workers on the job," "other crafts on the job."[12/]

[9/] There is insufficient credible evidence to find that Respondent picketed at any time that Calhoun's employees were not on the jobsite.

[10/] Picketing private property.

[11/] Agreement made at least more than several days after November 19.

[12/] Seaquist self servingly testified it was not his objective to persuade employees of other contractors to stop work. He added there was nothing he "specifically" wanted such employees to do.

C. Conclusions

It is clear that on November 18 and 19, with full knowledge that Mays had established a private or reserved entrance for Calhoun's employees, Respondent ignored such reserved entrance and picketed only the main entrance used by the employees of Mays and other subcontractors and the public and not by Calhoun's employees. It is manifest that such picketing was not addressed Calhoun's employees or Calhoun but rather was designed to enmesh innocent neutrals into Respondent's dispute with Calhoun. I reject as without merit, Respondent's contention that if it had picketed Calhoun at the private entrance or reserved gate it would have run the risk "of state civil or criminal prosecution." Respondent had no right to presume, as it appears to do, that Calhoun and his employees were "trespassers on November 18 and 19 when they undertook to use the dirt road." Properly, the presumption is that Calhoun and his employees acted legally and there is no evidence that Respondent made any effort to discover from the inhabitants or owner of the private home whether Calhoun and his employees used the private road with permission. Had Respondent wished to appeal to Calhoun's employees on November 18 and 19, it at least would have made such inquiry. The alleged defense is but a pretext.

Respondent's picketing activities at the jobsite on November 18 and 19 were consistent only with an intent to enlarge rather than limit the area of the dispute. Consequently, in the circumstances of this case, they were violative of the Act. Monterey Building and Construction Trades Council, 142 NLRB 139.

By its picketing of the jobsite on November 18 and 19, Respondent unlawfully forced and required Mays to cease doing business with Calhoun and with such objective induced and encouraged individuals employed by Mays, Pacific, Carrara, Industrial and other subcontractors of Mays, to engage in work stoppages or strikes; and threatened, coerced and restrained Mays, Pacific, Carrara, Industrial and other subcontractors of Mays. Respondent has thus violated Section 8(b)(4)(i) and (ii)(B) of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of Respondent as set forth in Section III, above, occurring in connection with the operations of Calhoun, Mays, Industrial, Pacific, Carrara and others as described in Section I above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The remedy

Having found Respondent has violated Section 8(b)(4)(i) and (ii)(B) of the Act, I shall recommend that it cease and desist therefrom, and take certain affirmative action to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in this case, I make the following:

VI. Conclusions of Law

1. The businesses of employers and status of Respondent as a labor organization have been discussed under Sections I and II above and corresponding conclusions are herein made.

2. By picketing and other conduct, and, by inducement and encouragement and by threats and coercion, at the Mays' project or jobsite with an object of forcing or requiring Mays to cease doing business with Calhoun, Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

VII. THE RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, I recommend Respondent and its agents, shall:

1. Cease and desist from:

(a) By picketing or other conduct, inducing or encouraging any individual employed by Mays or his subcontractors or any other employer, to engage in a strike or refusal in the course of his employment to use or handle any materials or perform any services, or threatening or coercing or restraining Mays, his subcontractors, or any other employer, where an object thereof is to force or require said employers to cease doing business with Calhoun.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Post in conspicuous places at its business offices or meeting halls, including all places where notices to members are customarily posted, copies of the notice attached hereto marked "Appendix."[13/] Copies of said notice to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by Respondent's authorized representative, be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(b) Sign and mail copies of said notice to the Regional Director for the Twenty-first Region for posting by Mays, Pacific, Carrera, Industrial and Calhoun, these employers willing, at all locations where notices to their employees are customarily posted.

13/ In the event that these recommendations be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words, "A DECISION AND ORDER."

(c) Notify the Regional Director for the Twenty-First Region, in writing, within 20 days from the date of the receipt of this Decision, what steps Respondent has taken to comply herewith.[14/]

Dated:

/s/ E. Don Wilson
E. Don Wilson
Trial Examiner

[14/] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read, "Notify said Regional Director, in writing within 10 days from the date of this Order what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL MEMBERS OF ORANGE BELT DISTRICT COUNCIL OF PAINTERS NO. 48 AFL-CIO

PURSUANT TO

THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

> WE WILL NOT engage in or induce or encourage, by picketing, or any other conduct, any individual employed by CECIL MAYS CONSTRUCTION CO., or any other employer, to engage in, a work stoppage or threaten or coerce or restrain CECIL MAYS CONSTRUCTION CO., or any other employer, where an object in either case is to force or require such employers to cease doing business with CALHOUN DRY-WALL CO.

ORANGE BELT DISTRICT COUNCIL OF PAINTERS NO. 48 AFL-CIO
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

Information regarding the provisions of this notice and compliance with its terms may be secured from the Regional Office of the National Labor Relations Board, 849 South Broadway, Los Angeles, California 90014 (Telephone No. 688-5206).

DECISION AND ORDER

On September 25, 1964, Trial Examiner E. Don Wilson issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the brief, and the entire record in this case, and hereby adopts the Trial Examiner's findings,[1/] conclusions,[2/] and recommendations.

[1/] The Respondent has excepted to the Trial Examiner's credibility resolutions. It is the Board's policy, however, not to overrule a Trial Examiner's resolutions with respect to credibility unless, as is not the case here, the clear preponderance of all the relevant evidence convinces us that the resolutions were incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F. 2d 362 (C.A.3).

[2/] In adopting the Trial Examiner's finding that Respondent picketed for a prohibited object in violation of Section 8(b)(4)(i) and (ii)(B), we rely not only on the place of picketing, but also on a statement of a business agent of Respondent to Mays that if Mays did not get things "straightened out" on the jobsite (get rid of Calhoun), Respondent would take "economic action," and on the testimony of this agent at the hearing that the picketing was directed not only at Calhoun's employees and the public, but also at "workers on the job" and "other crafts on the job."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner and orders that the Respondent, Orange Belt District Council of Painters No. 48, AFL-CIO, Santa Ana, California, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order.[3/]

Dated, Washington, D. C. September 7, 1965

Frank W. McCulloch, Chairman

Gerald A. Brown, Member

Sam Zagoria, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

3/ Substitute for Region 21, where it appears in the Trial Examiner's Recommended Order and Notice, to read: Region 31.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with Region 31, 17th Floor, U.S. Post Office &Court House, 312 N. Spring St., Los Angeles, California 90012, Tel. No. 688-5850.

COMPLAINT
AND
NOTICE OF HEARING

It having been charged by Frank A. Calhoun, d/b/a Calhoun Drywall Company (herein called Calhoun), that Orange Belt District Council of Painters No. 48, AFL-CIO (herein called Respondent), has engaged in, and is engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.* (herein called the Act), the General Counsel of the National Labor Relations Board (herein called the Board), on behalf of the Board, by the undersigned Regional Director, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing, and alleges as follows:

1. The original charge was filed by Calhoun on November 19, 1963, and was served on Respondent on November 20, 1963, by registered mail. The amended charge was filed by Calhoun on January 9, 1964, and was served on Respondent on January 9, 1964, by registered mail.

2. (a) Calhoun is engaged in San Bernardino, California, as a drywall contractor in the building and construction industry. During the fiscal year, commencing July 1, 1962, Calhoun has performed construction work valued in excess of $19,000 at various military projects and Department of Defense installations in the State of California. In connection with his business, during the same fiscal year, Calhoun has purchased and received goods, materials, and supplies which were shipped directly to him, or directly to his suppliers, from outside the State of California, valued at substantial amounts.

(b) Cecil Mays Construction Co. (herein called Mays) is engaged at Loma Linda, California, and vicinity, as a general contractor in the building and construction industry. At all times material herein Mays has been engaged, as the general contractor, in the construction of a medical

arts building at Santa Ana, California, to be occupied by medical doctors and used as doctors' offices and treatment rooms (herein called construction project).

(c) Industrial Electric (herein called Industrial), Pacific Plumbing (herein called Pacific) and Carrara Marble Co. (herein called Carrara) are engaged as an electrical contractor, plumbing contractor, and marble contractor, respectively, in the building and construction industry.

(d) In connection with its work at the construction project, Mays undertook to perform a part of the said work with its own employees and subcontracted other portions of the said work to various subcontractors, including the drywall work to Calhoun, the electrical work to Industrial, the plumbing work to Pacific and the exterior marble work to Carrara. For use at the construction project, Mays and its subcontractors have purchased and received goods, materials and supplies which came to them directly from points outside the State of California valued in excess of $50,000.

3. Calhoun, Mays, Industrial, Pacific, and Carrara are, and each is now, and has been at all times material herein, engaged in commerce or in an industry affecting commerce, and are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

5. At all times material herein Respondent has been engaged in a labor dispute with Calhoun. At no time material herein has Respondent had a labor dispute with Mays, Industrial, Pacific, Carrara, or any contractor or subcontractor other than Calhoun at the construction project.

6. In furtherance and support of the aforesaid dispute with Calhoun, on or about October 30, 1963, Respondent commenced picketing at 1125 East 17th Street, the main entrance to the construction project, with signs, the legend on which read: "Frank A. Calhoun IS UNFAIR and operates under Sub-Standard Working Conditions. District Council of Painters No. 48."

As a consequence of the said picketing, employees of Industrial, Pacific, Carrara, and other employers, engaged in work stoppages at the construction project.

7. On or about November 18, 1963, a separate entrance to the construction project was established at 1207 East 17th Street for ingress and egress of Calhoun's employees and a plainly visible sign thereat posted reading as follows: "This private entrance for sole use of Calhoun Dry-Wall employees. All other subcontractors' employees use entrance on 1125 East 17th Street. Cecil Mays, Contractor." At the same time there was posted at each side of the main entrance to the construction project at 1125 East 17th Street a plainly visible sign reading as follows: "Employees of all subcontractors use this entrance except employees of Calhoun Dry-Wall Co. who will use the private entrance at 1207 East 17th Street. Cecil Mays, Contractor." In addition to the posting of signs as aforesaid, Respondent was notified in writing of the establishment of a separate entrance for the use of Calhoun and its employees and was requested to cease its picketing at the main entrance to the construction project. At all times after the establishment of a separate entrance as aforesaid, and the posting of signs thereat, employees of Calhoun used exclusively the entrance reserved for them.

8. Notwithstanding the reservation of a separate entrance for the exclusive use of Calhoun and its employees, the posting of notices thereat, and the notification given Respondent thereof, Respondent continued to picket only at the main entrance to the construction project through which employees of contractors and subcontractors other than Calhoun passed. As a consequence of the said picketing at the main entrance, employees of Industrial, Pacific, Carrara, and of other employers, again engaged in refusals to work and work stoppages at the construction project.

9. By the acts and conduct set forth in paragraph 8 above, Respondent has engaged in, and has induced and encouraged individuals employed by Mays, Industrial, Pacific, Carrara, and by other persons engaged

in commerce or in industries affecting commerce, to engage in, strikes or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods, articles, materials or commodities, or to perform services, and has threatened, coerced and restrained Mays, Industrial, Pacific, Carrara, and other persons engaged in commerce or in industries affecting commerce.

10. Objects of the acts and conduct of Respondent set forth in paragraphs 8 and 9 above have been, and are: (1) to force or require Mays to cease doing business with Calhoun; and (2) to force or require Industrial, Pacific, Carrara, and other persons, to cease doing business with Mays in order to compel Mays to cease doing business with Calhoun.

11. By the acts described in paragraphs 8, 9, and 10 above, and by each of said acts, Respondent did engage in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(4)(i)(ii)(B) of the Act.

12. The acts of Respondent set forth in paragraphs 8, 9, 10, and 11 above, and in connection with the operations of the Employers described in paragraphs 2(a) through 2(d) and 3 above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and have led, and tend to lead, to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

13. The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i)(ii)(B) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 3rd day of April 1964, at 10 a.m., PST, in Hearing Room #1, Mezzanine Floor, 849 South Broadway, Los Angeles, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, Respondents shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four copies of an answer to said Complaint within 10 days from the service thereof and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

DATED at Los Angeles, California, this 10th day of February 1964.

/s/ Ralph E. Kennedy
Ralph E. Kennedy, Regional Director
NATIONAL LABOR RELATIONS BOARD
Region 21
849 South Broadway
Los Angeles, California 90014

ANSWER TO COMPLAINT

Respondent, Orange Belt District Council of Painters No. 48, AFL-CIO, in answer to the complaint heretofore issued, admits, alleges and denies as follows:

1. Answering the allegations of paragraphs 1, 2 (b), 4, and 5, Respondent admits the allegations thereof.

2. Answering the allegations of paragraphs 2 (a), 2 (c), 2 (d), and 3, Respondent has neither information nor belief upon the matter therein set forth sufficient to enable it to answer the same, and placing its answer upon that ground denies generally and specifically each and every allegation and statement therein contained.

3. Answering the allegations of paragraphs 7, 8, 9, 10, 11, 12 and 13, Respondent denies generally and specifically each and every allegation and statement therein contained.

4. Answering the allegations of paragraph 6, Respondent admits that on or about October 30, 1963 Respondent commenced picketing at the entrance to the construction project closest to the point where the employees of Calhoun were working and which was customarily used by Calhoun and his employees, with signs on which the legend read, "Frank A. Calhoun is unfair and operates under substandard working conditions. District Council of Painters No. 48". Except as herein admitted, Respondent denies generally and specifically each and every allegation and statement therein contained.

WHEREFORE, Respondent prays that these proceedings be dismissed.

RICHMAN, GARRETT & ANSELL

By /s/ Lionel Richman
Lionel Richman

Attorneys for Respondent

Petition for Review of Decision and Order of the National Labor Relations Board.

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Comes now Orange Belt District Council of Painters No. 48, AFL-CIO, a labor organization, its affiliated local unions, and its agents, and file their Petition persuant to the provisions of the Labor Management Relations Act of 1947, as amended (Chap. 20, 61 Stat. 136, et seq; 29 U.S.C.A., Sec. 141, et seq.) hereinafter referred to as the Act, for the review of the Decision and Order of the National Labor Relations Board

entered in Washington, D.C. on September 7, 1965 in National Labor Relations Board case number 31-CC-7ordering and directing that petitioners cease and desist from certain alleged violations of Section 8 (b) (4) (i) (ii) (B) of the act, and respectfully represent to this Court as follows:

I

Jurisdiction

That petitioner, Orange Belt District Council of Painters No. 48, is a labor organization within the meaning of the Act, with their principal offices in the counties of Riverside, San Bernardino and Orange, all in the State of California.

The respondent, National Labor Relations Board, hereinafter referred to as the Board, is an agency of the United States of America, originally created pursuant to an Act of Congress, dated July 5, 1935, commonly known as the National Labor Relations Act (Chap. 372, 49 Stat. 451; 29 U.S.C., Sec. 153) and continued in existence under the Labor Management Relations Act of 1947, as amended (Chap. 20, 61 Stat. 139; 29 U.S.C., Sec. 153); that the principal office of said Board is in Washington, D.C., within the jurisdiction of this Honorable Court. That all of the acts and conduct constituting the alleged unfair labor practices with which petitioners are charged occurred in the State of California, and that accordingly, this Court has jurisdiction to hear this Petition by reason of Section 10 (f) of the Act (29 U.S.C., Sec. 160 (f).

II

Statement of Proceedings

A. Filing of Charges: On or about November 20, 1963, Frank A. Calhoun filed with the Twenty-first Regional Office of the National Labor Relations Board in Los Angeles, California unfair labor practice charges. Said charges numbered 21-CC-686 (thereafter renumbered 31-CC-7 by

the Respondent Board) alleged violations of Section 8 (b) (4) (i) (ii) (B) of the Act.

B. On February 10, 1964, the Regional Director of the Twenty-first Region of the Board issued a complaint and notice of hearing. The complaint alleged in substance that petitioners herein have picketed the construction site of Cecil Mays Construction Co. for the purpose of compelling Mays to cease doing business with Calhoun.

C. The Petitioner herein answered in substance by denying the commission of any unfair labor practices.

D. On April 3, 23 and 24, 1964, hearings were held before E. Don Wilson, Trial Examiner, in Los Angeles, California. On September 25, 1964, the said Trial Examiner made and entered his immediate report and filed the same with the National Labor Relations Board. In said report, he found and concluded that Petitioner had engaged in unfair labor practices and recommended a cease and desist order.

E. Subsequent to the filing of said report by the Trial Examiner, the National Labor Relations Board made and entered its Order transferring said case to the Board and continuing said case before the Board.

F. Thereafter, Petitioner filed its Objections to said Intermediate Report and recommended Order, Findings of Fact and Conclusions of Law and Recommendations of the Trial Examiner.

G. On September 7, 1965, the Board entered its decision and order in the above entitled case. Said decision and order adopted the Findings, Conclusions and Recommendations of the Trial Examiner and specifically found that Petitioner had violated Section 8 (b) (4) (i) (ii) (B) of the Act. Said decision and order required Petitioners to cease and desist from said alleged unfair labor practices, to post certain notices, and notify the Regional Director of the Thirty-first Region of Petitioner's steps taken to comply therewith.

III

Grounds for Review.

Petitioners respectfully seek the review of this Honorable Court of said Decision and Order of the Board upon the following grounds:

1. That insofar as said Decision and Order of the Board found these petitioners had violated the Act, said Finding, Decision and Order are not supported by substantial evidence on the record considered as a whole and are, in fact, contrary to the evidence.

2. That insofar as said Decision and Order found these petitioners had violated the Act, said Decision and Order are based upon an improper construction and interpretation of the law.

3. That insofar as said Decision and Order found these petitioners had violated the Act, said Decision and Order are contrary to law.

4. That insofar as said Decision and Order found these petitioners had violated the Act, said Decision and Order denies to petitioners and to their members the protection of the First Amendment to the Constitution of the United States.

WHEREFORE, petitioners petition this Honorable Court for a review of the Decision and Order of the Board dated September 7, 1965, and pray:

1. That a copy of this Petition and of the process of this Court be served upon the respondent, National Labor Relations Board, as provided by Section 10 (f) of the Act.

2. That the Board be directed and required by an appropriate order of this Honorable Court to certify and file with the Court, pursuant to Section 10 (j) of the Act, a transcript of the entire record in the proceedings, including therein the Trial Examiner's Intermediate Report, all exhibits and the original of the charges filed with the Board, from which the complaint was formulated and issued, and the transcript of the testimony and proceedings at the hearing before the Trial Examiner.

3. That this Petition for Review be preferred and heard and determined expeditiously, as provided in Section 10 (i) of the Act.

4. That the said Decision and Order be, in all respects annulled, vacated and set aside, and that the Board be ordered and directed to dismiss the complaint and proceedings.

5. That petitioners shall have such other and further relief as may be just.

Dated at Washington, D. C. this 1st day of November, 1965.

LIONEL RICHMAN
LEWIS GARRETT
HERBERT M. ANSELL

1325 Wilshire Boulevard
Los Angeles 17, California

HERBERT S. THATCHER
DAVID BARR

1009 Tower Building
Washington, D. C.

By /s/ S. Thatcher
Attorneys for Petitioners

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD TO PETITION TO REVIEW AND CROSS-PETITION FOR ENFORCEMENT

To the Honorable, the Judges of the United States Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board, by its Assistant General Counsel, pursuant to the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec 151*et seq.*), files this answer to the petition to review its order issued on September 7, 1965 and cross-petition for enforcement thereof.

1. The Board admits the allegations as to parties and jurisdiction in Section I of the petition.

2. With respect to the allegations contained in Section II of the petition, the Board prays reference to the certified record of the proceedings before the Board for a full recital of the facts and proceedings had in this case.

3. The Board denies each and every allegation of error contained in Section III at pages 4 and 5 of the petition.

4. Further answering, the Board avers that the proceedings had before it, the findings of fact, conclusions of law, and order of the Board were and are in all respects valid and proper, and respectfully requests this Court to enter a decree enforcing said order.

5. Pursuant to Section 10(f) of the Act, and rule 38(g) of this Court, the Board will certify and file with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceedings before the Board.

WHEREFORE, the Board prays that this Court cause notice of the filing of this answer to be served upon petitioner and that this Court enter a decree denying the petition to review the Board's order.

/s/ Marcel Mallet-Prevost
Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this day of November, 1965.

Statement of Points

The points upon which Petitioners intend to rely in this Appeal are as follows:

1. Can the reserve gate doctrine formulated in *Local 761, IUE vs. NLRB*, 366 U.S. 667, invalidate picketing otherwise lawful when such picketing occurs at a construction common situs and is directed against a contractor whose employees perform tasks connected with, and an integral part of the normal operations of the entire project?

2. Can the reserve gate doctrine invalidate picketing otherwise lawful when the union by picketing at the separate entrance would thus be exposed to possible civil and criminal responsibility in the state courts?

3. Does the reserve gate doctrine when used to invalidate picketing at a construction common situs to interfere with the effective publicizing of the union's viewpoint that it infringes on the guarantee of the First Amendment to the Constitution of the United States.

DATED: At Washington, D. C., this 17th day of December, 1965.

LIONEL RICHMAN
LEWIS GARRETT
HERBERT M. ANSELL

1336 Wilshire Boulevard
Los Angeles 17, Calif.

HERBERT S. THATCHER
DAVID BARR

1009 Tower Building
Washington, D. C.

By /s/ David Barr
Attorneys for Petitioners

PETITIONERS' OPENING BRIEF.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,752

ORANGE BELT DISTRICT COUNCIL OF PAINTERS No. 48, AFL-CIO, its affiliated local unions, and its agents,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

RICHMAN, GARRETT & ANSELL,
1336 Wilshire Boulevard,
Los Angeles, Calif. 90017,

THATCHER & BARR,
1009 Tower Building,
Washington, D.C., 20005,

Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,752

ORANGE BELT DISTRICT COUNCIL OF PAINTERS No. 48, AFL-CIO, its affiliated local unions, and its agents,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONERS' OPENING BRIEF.

Jurisdictional Statement.

This case is before the Court on the petition of ORANGE BELT DISTRICT COUNCIL OF PAINTERS NO. 48, AFL-CIO, its affiliated local unions and its agents, to review and set aside an Order of the NATIONAL LABOR RELATIONS BOARD issued against petitioners on September 7, 1965, pursuant to Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Section 151, *et seq.*). In its Answer the Board requested enforcement of its Order against petitioners. The jurisdiction of this Court is based on Section 10 (f) of the Act. The Board's Decision and Order are reported at 154 N.L.R.B. No. 83 (J.A. 44).*

*The Joint Appendix is hereinafter referred to as "J.A."

Statement of the Case.

ORANGE BELT DISTRICT COUNCIL OF PAINTERS NO. 48, AFL-CIO, is hereinafter referred to as "Union"; CECIL MAYS is hereinafter referred to as "Mays"; and FRANK A. CALHOUN, DRYWALL COMPANY, is hereinafter referred to as "Calhoun".

On or about October 29, 1963, Mays was engaged as a general contractor in the construction of a medical arts building in Santa Ana, California. He performed part of the work with his own employees and subcontracted out various phases, as follows: electrical — Industrial Electric Co., plumbing — Pacific Plumbing, marble — Carrara, drywall and taping — Calhoun (J.A. 46-47).

On or about October 29, 1963, Earl Mayes, superintendent, was approached by Bill Seaquist, representative of the Union, relative to the use of Calhoun. Mayes recalled Seaquist advising him there would be "labor trouble on the job" if Calhoun's employees worked there; that Seaquist advised him that Calhoun was under contract with District 50, United Mine Workers, and that if the matter was not straightened up, the job would be picketed.

When Calhoun's employees appeared the next day, October 30, 1963, the Union commenced picketing at each of the two main entrances located at 1125 East 17th Street, with a sign reading:

> "Frank A. Calhoun is Unfair and Operates Under Substandard Working Conditions. District Council of Painters No. 48" (J.A. 47)

Mayes instructed Calhoun's employees to leave the job site and when this happened the picketing stopped immediately. A few days later when Calhoun's employees returned, the picketing commenced again, and when they were again asked to leave, the picketing immediately stopped. (J.A. 3-4.)

Immediately to the east of the 1125 East 17th Street entrance, there are several rows of avocado trees. To the east of this was a private dwelling house located at 1207 East 17th Street. The persons residing on the property are caretakers and the actual owners are unknown. (J.A. 5-6). To the east of the dwelling house is a private roadway, essentially a dirt road, unnamed and having some gravel upon it. This roadway winds in a northerly direction behind the dwelling house, some sheds and other items of a private nature. The road runs behind the avocado patch some 250 feet before reaching property owned by the medical arts corporation. On the medical center property, there was located at the time some medical offices and a pharmacy already completed, together with a parking area. There was only one building in the process of construction. There was room for one car to travel on the private dirt road. (J.A. 7-9.)

The subcontract to Calhoun required of him to erect metal studs, put up partitions, sheetrock the frame of the building, taping, sanding and preparation for painting. Certain preparatory construction work must have been completed before Calhoun would commence his operation. In turn, the completion of Calhoun's operation was necessary before concrete construction and cement plaster could be applied to the exterior of the

building. Thus the work of Calhoun was essential to the other phases of construction, and in turn, other phases of the construction were necessary in order that Calhoun successfully complete his part. The function, therefore, of employees of other contractors was related to the normal operations of Calhoun and closely integrated therewith. (J. A. 11-12.)

Calhoun asserts that on November 17, 1963, he sent a telegram to the Union advising that a separate entrance was being set up for the use of Calhoun's employees and that picketing should be confined to that entrance only. On the morning of November 18, 1963, a sign was posted at the private dirt road immediately to the east of the dwelling house located at 1125 East 17th Street, said sign reading:

> "This Private Entrance for Sole Use of Calhoun Drywall Employees. All other subcontractors' Employees Use Entrance on 1125 East 17th. Street. Cecil Mays, Contractor." (J.A. 47.)

On November 18 and 19, the employees of Calhoun did, in fact, use the dirt road located at 1207 East 17th Street. Employees of other contractors used the two main entrances located at 1125 East 17th Street. All other persons coming on to the job site for the purpose of patronizing the drug store or utilizing the services of doctors and dentists located in the medical building would use the two entrances at 1125 East 17th Street. The only persons who were observed to use the dirt road at 1207 East 17th Street, other than Calhoun's employees, were persons entering the dwelling house located at 1207 East 17th Street. (J.A. 32-33.)

Picketing continued by the Union on November 18 and 19 only at the times when Calhoun's employees were actually on the job site and would immediately cease when they left. The object of the picketing was to advise patrons coming on to the premises and employees of Calhoun that Calhoun paid substandard wages that dissipated the standards established in the Painters contract; that it was not intended to persuade employees of other contractors to cease work in any regard (J.A. 24-25); that at all times the job site was extremely busy and that many people were going on to the premises by means of the 1125 East 17th Street entrances who were the subject of appeal. (J.A. 25-26.) Bill Seaquist, the Union representative, was aware that picketing at the separate entrance would not reach the patrons of the medical building or drug store who were coming on to the job site by means of the 1125 East 17th Street entrance in large numbers. (J.A. 27-28.)

The Union urged, before the Trial Examiner and the Board, that the reserve gate doctrine was not applicable to picketing activities at construction job sites, and that since the Union activities clearly conformed to the standards set forth in *Sailors Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547, no basis for a liability existed. Both the Trial Examiner and Board ignored this contention and concluded that the Union's picketing activities were violative of Section 8 (b)(4)-(i)(ii)(B).

ARGUMENT.

I

The Board Erred in Finding Petitioners to Have Violated Sections 8(b)(4)(i)(ii)(B) of the Act by Picketing at the Main Entrance to a Construction Site, When the Employees of the Primary Employer Were Using a Separate Entrance to the Site.

The Board predicates its findings of a violation of the Act solely on the fact that the Union continued to picket at the two entrances located at 1125 East 17th Street after a separate entrance had been erected at 1207 East 17th Street for the employees of Calhoun. The Board's decision is bottomed on the "reserve gate" doctrine approved in *Local 761 I.U.E. vs. N.L.R.B.* 366 U.S. 667, 81 Sup. Ct. 1285. For reasons to be discussed at length, it is submitted that the Board's reliance is totally misplaced and that in fact the so-called "reserve gate" doctrine is limited to the particular facts involved in that case, and cannot be applied to invalidate picketing at a common construction site.

The instant case being one of first impression at this judicial level, it is appropriate to consider certain well established general principles in determining the applicability of the "reserve gate" doctrine to the situation at bar. The right of Trade Unions to engage in primary economic activities to achieve lawful labor objectives has been safeguarded by Congress and our courts for decades. In *N.L.R.B. vs. International Rice Milling Co.*, 341 U.S. 665, 672, the court stated:

> "In this Act, Congress safeguarded the exercise by employees of concerted activities and expressly recognized the right to strike."

And in *Local 761, I.U.E. vs. N.L.R.B.*, at page 671, the court stated:

> "Congress did not seek, by Section 8 (b)(4), to interfere with the ordinary strike."

And in *N.L.R.B. vs. International Rice Milling Co.*, 341 U.S., at page 633, the court again stated:

> "By Section 13 Congress has made it clear that Section 8 (b)(4) and all other parts of the Act which otherwise might be read so as to interfere with, impede or diminish its traditional right to strike, may be so read only if such interference, impediment or diminution is specifically provided for in the Act."

In *N.L.R.B. vs. Local Union No. 639 (Curtis Bros.)*, 362 U.S. 274, 80 Sup. Ct. 706, the court stated at page 281:

> "Picketing has been equated with striking for the purpose of Section 13."

And, again at page 282:

> "Section 13 declares a rule of construction which cautions against an expansive reading of that section which would adversely affect the right to strike unless the Congressional purpose to give it that meaning persuasively appears either from the structure or history of the statute. Therefore, Section 13 is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation of Section 8 (b)(1)(A) which safeguards the right to strike as understood prior to the passage of the Taft-Hartley Act."

And, in *N.L.R.B. vs. Denver Building Trades Council,* 341 U.S. 675, 692, the court emphasized that Section 8 (b)(4) is an accommodation between:

> ". . . the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures including controversies not their own."

It is significant to briefly consider the genesis of the reserve gate doctrine. Initially, the Board applied a rigid geographical test. Thus, if the picketing activity occurred at the primary employer's premises, then it was considered protected primary activity regardless of the circumstances involved. Conversely was the result when the picketing occurred at premises owned by secondary parties. *Printing Specialties Union,* 82 N.L.R.B. 271, *Oil Workers International Union,* 84 N.L.R.B. 315. In *United Electrical Workers (Ryan Construction Corp.)* 85 N.L.R.B. 417, the Union on strike against *Bucyrus* picketed at that plant, and a secondary party, *Ryan,* erected a separate gate through a fence for use of his employees solely. The Board concluded that the Union could lawfully picket the *Ryan* gate, and that the picketing was primary in nature.

With the Board's increasing cognizance of the intricate problems involved where two or more employers were performing separate tasks upon common premises, it established new standards of liability in order that

a proper balance between the Union's right to engage in primary picketing and the interest of the secondary employer in being free from picketing be maintained. In *Sailors Union of the Pacific (Moore Dry Dock)*, 92 N.L.R.B. 547, the Board set out four standards for picketing in such situations, fulfillment of which would be presumptive of valid primary activity:

1. That the picketing be limited to times when the situs of dispute was located on the secondary premises.
2. That the primary employer be engaged in his normal business at the situs.
3. That the picketing take place reasonably close to the situs.
4. That the picketing clearly disclose that the dispute was only with the primary employer.

In *Local 761, I.U.E. vs. N.L.R.B.* (supra), the court determined affirmatively that the Board could "apply the Dry Dock criteria so as to make unlawful picketing at a gate utilized exclusively by employees of independent contractors who work on the struck employer's premises." The court stated that such separate entrance could properly support a finding of liability against the picketing Union only if the independent workers were performing tasks unconnected to the normal operations of the struck employer. The court added, however, at page 680:

> "On the other hand, if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees *whose tasks aid the employer's every-day operations.*" (emphasis added.)

This requirement of the reserve gate doctrine was further explained in *Steelworkers vs. N.L.R.B.* 376 U.S. 492, at page 497, as follows:

> "The legality of separate gate picketing is dependent upon the type of work being done by the employees who use that gate; *if the duties of those employees were connected with the normal operations of the employer, picketing directed at them was protected primary activity, but if their work was unrelated to the day-to-day operation of the employer's plant, the picketing was an unfair labor practice.*" (emphasis added.)

The court further explained the underlying rationale for this requirement. Essentially the court held that effective primary economic activities require that economic pressure be imposed upon the day-to-day operations of the struck employer, and that the reserve gate doctrine could not be applied so as to interfere with this objective. As the court stated at page 499:

> "The primary strike power which is protected by the proviso, is aimed at applying economic pressure by halting the day-to-day operations of the struck employer. But Congress not only reserved the right to strike; it also saved 'primary picketing' from the secondary ban. Picketing has traditionally been a major weapon to implement the goals of the strike, and has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt. *In light of this traditional goal of primary pressures we think Congress intended to preserve the right to picket during this strike a gate reserved*

for employees of neutral delivery men furnishing day-to-day service essential to the employer's regular operations." (emphasis added.)

Thus the Union, by primary strike and picketing activities can appeal to individuals who may conceivably accept employment, employees of companies making deliveries, employees of customers, and employees of other employers who enter upon the premises to engage in work related to the normal operations of such enterprise.

The *General Electric* case was remanded because the Board, according to the court, might not have taken into account that:

> "If gate 3-A was, in fact, used by employees of independent contractors who perform conventional maintenance work necessary to the normal operations of General Electric, the use of the gate would have been a singled one outside the bar of Section 8 (b)(4)(A). In short, such mixed use of this portion of the struck employer's premises would not bar picketing rights of the striking employees."

On remand, the National Labor Relations Board decided that the work schedule to be done by independent contractors during the picketing period was related to General Electric's normal operations, and therefore, dismissed the complaint. *General Electric Company,* 138 N.L.R.B. 342 (Aug. 28, 1962). See to same effect *Local No. 1, I.B.W. and Mallinckrodt Chemical Works,* 148 N.L.R.B. 36.

Applying these important principles to the instant case, it is clear that if the picketing was performed at such places and in such manner necessary to effec-

tively communicate with persons coming on to the premises to assist in the normal operations of the struck employer, and thus to effectively interfere with such operations, it necessarily was protected by the proviso to Section 8 (b)(4)(i)(ii)(B) of the Act. In this connection we summarize the essential facts of the instant case which make it clear that the prerequisites for application of the reserve gate doctrine are not met:

(1) The functions of Calhoun upon the construction project could be fulfilled only after the completion of tasks by other crafts, and Calhoun was required in turn to complete his tasks before the rest of the construction could be accomplished. Thus the entire construction project involved a degree of inter-dependence to such extent that to attempt to find any task unrelated to the normal operations of any other craft is virtually an absurdity. Consequently, the Union's picketing at gates other than that reserved for Calhoun's employees, must of necessity have caused substantial interference with the normal day-to-day operations of Calhoun.

(2) The Union, by picketing at gates set aside for employees of contractors other than Calhoun, could properly appeal to persons who might potentially accept employment with Calhoun. To restrict the picketing to the Calhoun entrance would necessarily prevent communication with this category of persons.

(3) The Union could properly address an appeal to Calhoun's employees throughout the entire working day, and not just at the times when such employees entered or left the construction premises. To meet this basic requirement, the Board must establish that Calhoun employees performed work in such proximity to the separate entrance erected for those employees that

they were in constant sight of picket signs erected at that entrance. This we submit it cannot do, because concededly the Calhoun entrance was so far removed from the construction site that communication between the Union and the employees was virtually impossible. This basic right, we submit, is not merely academic but is an important avenue of communication through which employees of Calhoun could well be influenced to make common cause with the Union. The Supreme Court has repeatedly recognized the communication aspect and other facets of picketing activities which frequently evoke responses from people over and above the actual message appearing on the picket sign. In *Thornhill vs. Alabama,* 310 U.S. 83, the court stated:

> "In the circumstances of our times, the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the constitution."

In *Building Service Union vs. Gassan,* 339 U.S. 532, at page 537, the Supreme Court recognized, however, that in addition to the element of communication:

> ". . . picketing is more than speech, and establishes a locus in quo that has far more potential for inducing action or non-action than the message the pickets convey . . ."

Again, in *Hughes vs. Superior Court,* 339 U.S. 460, at page 465, the court recognized that:

> ". . . the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties

> and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word."

We submit that the employees of Calhoun were a proper subject from which to initiate a response by the appearance of pickets throughout the day.

(4) The Union could properly appeal to employees of secondary employers entering the premises directly or indirectly to assist in the normal operations of the primary employer. Although the Union could not induce secondary employees to engage in work stoppages to accomplish a proscribed objective under the Act, it nonetheless could properly carry its appeal to them. The court in *Local 761, I.U.E. vs. N.L.R.B.* (supra), recognizes this distinction at page 672 when it states:

> "It is clear that, when a Union pickets an employer with whom it has a dispute, it hopes, even if it does not intend, that all persons will honor the picket line, and that hope encompasses the employees of neutral employers who may in the course of their employment (delivery and the like) have to enter the premises. Almost all picketing, even at the situs of the primary employer, and surely that of the secondary, hopes to achieve the forbidden objective whatever other motives there may be and however small the chances of success. *Picketing which induces secondary employees to respect the picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer.*" (emphasis added.)

(5) The Union could properly appeal to persons coming on the premises to patronize the medical offices, or the drug store. Picketing confined to the entrance at 1207 East 17th Street, through which entrance no persons entered with the exception of Calhoun employees and the persons residing in the private dwelling house, would utterly fail in its objective of appealing to such category of persons.

(6) In the *General Elcctric* case, a much stronger situation for application of the reserve gate doctrine existed. General Electric had contracted out construction work to an outside firm and such action was clearly unequivocable. In the instant case, the general contractor, Mays, was awarded, as is typical in the construction industry, a contract rendering him responsible for the completion of the entire project. By choice, and solely as a matter of convenience, he subcontracted out various phases of the construction work to several firm among which was Calhoun. Despite this fact, his overall responsibility for completion of the project was not affected. Although the General Counsel failed to produce a copy of the Calhoun-Mays contract, it typically would contain language permitting Mays to terminate the contract and take over the work if any of several contingencies occurred.* In the event of such a cancellation, Mays could overnight take over the function of painting and taping, erection of studs and the other construction functions awarded to Calhoun. In such event, Mays would immediately change from the status of secondary to primary employer. It is highly important,

*Typically, construction subcontracts permit the general contractor to terminate, for example, if the subcontractor's operations become hampered by labor difficulties.

therefore, to view the work involved in the instant case as a total unity with certain phases being contracted out on a relatively contingent basis. If Mays were to terminate the contract with Calhoun and complete the job himself, the Union which confined its picketing to the so-called reserve gate, would have no accurate means of becoming aware of such change. Therefore its ability to communicate with the new primary employer and his employees would be rendered virtually impossible. In this connection the Union has the important safeguarded right to address its appeal to workers who, overnight and behind the picket line, might take over the work of the primary employer. Likewise, rather than actually displacing Calhoun, Mays could conceivably and for a variety of reasons, render such degree of assistance as to constitute himself an "ally" of Calhoun. In such event the Union could lawfully address its picketing appeal to the employees of Mays, treating him and Calhoun as both primary disputants. *N.L.R.B. vs. Electrical Workers*, 228 Fed 2d. 533, cert, denied, 100 L. Ed. 698.

It has been amply demonstrated that the principle of the *General Electric* case should be strictly limited to the unique facts existing in that case. As stated in the dissenting opinion in *Building Trades Council (Markwell & Hartz, Inc.)*, 155 N.L.R.B. No. 42:

> ". . . application of general principles enunciated by the Supreme Court must be limited to the precise set of circumstances that occasioned their formulation."

The principle of the "reserve gate", we submit by reason of the above, cannot be properly applied as a basis of liability in the instant case or to any situation involving the exercise of economic activities at a construction project. The physical and functional circumstances involved in any such situation operate in such manner that to apply the doctrine would subvert the important protections of effective peaceful picketing afforded to labor unions by Congress and the courts, which protections have become a part of our national policy. The High Court appropriately stated in *Local 1976, Carpenters vs. N.L.R.B.* 357 U.S. 93, 99-100:

> "It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the nation, and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy against secondary boycotts as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law."

To affirm the application of the "reserve gate" doctrine to construction project picketing would, we submit, distort its intended meaning and would constitute legislation by Labor Board fiat.

Conclusion.

The reserve gate doctrine formulated by the Supreme Court in *Local 761, I.U.E. vs. N.L.R.B.* (Supra), is limited in its application to the peculiar facts of that case. This doctrine can be applied to picketing activities at construction job sites, only at the price of subverting the protections afforded by Congress and the courts to Trade Unions in the area of peaceful picketing. Indeed, the application of such doctrine in the area of construction would make impossible the fulfillment of the following proper objectives contemplated by the Union in the instant case:

(1) Appeals to persons entering upon the construction site to use the drug store or medical offices;

(2) Appeals to employees of secondary employers, such appeals falling short of inducement to engage in work stoppages;

(3) Appeals to employees of Calhoun throughout the course of the day while they are engaged in normal work operations;

(4) Appeals to employees of the general contractor who potentially might be called upon to take over the function of Calhoun's employees in the event of termination of his contract;

(5) Appeals to persons entering on the job site for the purpose of securing employment with Calhoun.

The questions presented by the instant case have not up to the present time been definitively answered by any federal intermediate court. The respondent Board up to the present has summarily dismissed the problem, relying upon an erroneous interpretation of the deci-

sion in *Local 761, I.U.E. vs. N.L.R.B.* (supra). This Court's decision will determine the extent to which labor unions today, in the building and construction industry, can effectively engage in peaceful picketing with the object of persuading various classes of persons to support its cause. This Court's decision will likewise determine how effectively Trade Unions can, by peaceful picketing, enforce labor agreements with contractors who engage in work projects of extremely short duration. In this regard the decision will determine the extent to which labor unions in the building and construction industry can preserve the working standards established after protracted struggle on behalf of their membership. As was appropriately observed by the U.S. Supreme Court in *Carroll vs. Lanza,* 349 U.S. 408, 413, 75 Sup. Ct. 804:

> "We write, not only for this case, and this day alone, but for this type of case."

By reason of the above, petitioners respectfully request that the Board's decision and order be vacated in its entirely.

Respectfully submitted,

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,752

ORANGE BELT DISTRICT COUNCIL OF PAINTERS NO. 48, AFL-CIO, ITS AFFILIATED LOCAL UNIONS AND ITS AGENTS, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition To Review and Cross-Petition for Enforcement of An Order of the National Labor Relations Board

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National Labor Relations Board.

STATEMENT OF QUESTIONS PRESENTED

The parties have stipulated (J.A. 1) to this statement of the issues:

1. Whether the Board erred in finding petitioners to have violated Section 8(b)(4)(i) and (ii)(B) of the Act by picketing at the main entrance to a construction site when the primary employer's employees were using a private or reserved entrance to the site.

2. Whether the Board's decision, finding a violation in the circumstances here present, impinges upon petitioners' rights under the First Amendment to the Constitution of the United States.

INDEX

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Cases—Continued

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* Authorities chiefly relied upon

United States Court of Appeals

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ORANGE BELT DISTRICT COUNCIL OF PAINTERS NO. 48, AFL-CIO, ITS AFFILIATED LOCAL UNIONS AND ITS AGENTS, PETITIONERS

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NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition To Review and Cross-Petition for Enforcement of An Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of Orange Belt District Council of Painters No. 48, AFL-CIO, its affiliated local unions and its agents (hereafter collectively referred to as "the Union"), to review an order of the National Labor Relations Board issued against the Union on September 7,

1965, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*). In its answer the Board has requested enforcement of its order. The Board's decision and order are reported at 154 NLRB No. 83. This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the Act.

I. The Board's Findings of Fact

The Board found that the Union picketed at a construction site with an object of forcing a general contractor to cease doing business with a subcontractor in violation of Section 8(b)(4)(i) and (ii)(B) of the Act. The facts on which the Board's decision is based are summarized below.

Cecil Mays Construction Company ("Mays") was the general contractor for the construction of a medical arts building in Santa Ana, California (J.A. 34). The site of this construction was a large rectangular tract of land fronting in part on East 17th Street; the southeastern corner of this tract, however, was separately owned and contained a private house physically separated from the work area by a grove of avocado trees (J.A. 35; 6-7). Access to the project was provided by two entrances at 1125 East 17th Street. In addition, there was a private dirt and gravel road at 1207 East 17th Street for use by the owner of the smaller tract. This private road, located at the easternmost boundary of the tract, extends far enough north from 17th Street, beyond the

private home, to permit access to the jobsite (J.A. 35; 9).

Mays subcontracted the drywall work—which involved installation of the building's interior walls—to the Calhoun Drywall Company ("Calhoun"), an employer with whom the Union has no contract (J.A. 34, 35; 11-12). On October 29, 1963,[1] Bill Seaquist, business representative of the Union, told Mays' superintendent that Calhoun was not under contract to the Union, and that Calhoun's employees worked under "substandard working conditions." Seaquist expressed the hope that Mays could get the situation "straightened out," indicating that otherwise there would probably have to be "economic action taken on his job" (J.A. 35-36; 12-13, 20-21).

The next day, October 30, Union pickets began patrolling on the sidewalk in front of the two entrances to the jobsite at 1125 East 17th Street. The signs carried by the pickets stated (J.A. 36):

> Frank A. Calhoun Is UNFAIR and operates under Sub-Standard Working Conditions. District Council of Painters No. 48.

The same day, employees of subcontractors other than Calhoun left the jobsite because of the picketing (J.A. 36; 4-5). Thereupon, Mays requested that Calhoun's employees leave the premises, the picketing then stopped, and the other subcontractors' employees returned to work (J.A. 36; 3).

Several days later, however, Calhoun's employees returned to the job; the Union resumed picketing

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[1] Hereafter, all dates refer to 1963.

at the same location with the same signs; and the other subcontractors' employees again walked off the job (J.A. 36; 3-5). Again, Mays had Calhoun remove his employees to end the walkout.

On November 17, the Union received a night letter bearing Mays' signature which stated that "Calhoun Drywall Company and his employees are no longer privileged to use the entrances" at 1125 East 17th Street and that "a private entrance" for their "sole and exclusive use" had been established at 1207 East 17th Street. The letter concluded with a request that picketing at the main entrance cease (J.A. 36-37). Calhoun explained at the Board hearing that he had requested and received permission from the owner to use this private road for access to the jobsite (J.A. 18-19). On Monday morning, November 18, this sign was posted conspicuously at the "main" entrance (1125 East 17th Street):

> Employees of all subcontractors use this entrance except employees of Calhoun Dry-Wall Co. who will use the private entrance at 1207 East 17th Street. Cecil Mays, Contractor

Simultaneously, the following sign was posted at the "private" entrance (1207 East 17th Street):

> This private entrance for sole use of Calhoun Dry-Wall employees. All other subcontractors' employees use entrance on 1125 East 17th Street. Cecil Mays, Contractor.

When the Union pickets arrived at the jobsite that morning, they saw the signs and telephoned Seaquist for instructions. He told them *not* to picket the

private entrance but to remain at the main entrance, and the pickets complied (J.A. 38; 26-27). Employees of other contractors either did not report to work that day, or left the jobsite; only Mays' and Calhoun's employees worked (J.A. 38). The next day, Mays directed Calhoun to leave the jobsite until the labor dispute was settled because the job was being delayed, and Calhoun complied.

At the Board hearing, Seaquist testified that the purpose of the picketing "mainly was to advise . . ." that Calhoun's employees were working under substandard conditions. Seaquist admitted that the appeal was directed not only at Calhoun's employees, but also at "the [other] workers on the job . . . the other crafts on the job" (J.A. 38; 24-25).[2]

II. The Board's Conclusions and Order

Upon the foregoing facts, the Board found that the Union's picketing of the main entrance to the construction site on November 18 and 19, 1963, violated Section 8(b)(4)(i)(ii)(B) of the Act. The Board concluded that the picketing induced and encouraged individuals employed by Mays and by subcontractors of Mays to engage in work stoppages or strikes, and threatened, coerced and restrained Mays and Mays' subcontractors, both with an object of forcing and requiring Mays to cease doing business with Calhoun.

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[2] In addition, Seaquist testified, the appeal was also aimed at other people, i.e., customers who used the main entrance in order to visit a drugstore and doctors' offices on the premises (*ibid.*).

The Board ordered the Union to cease and desist from the unfair labor practice found and to post an appropriate notice.[2]

SUMMARY OF ARGUMENT

I.

Section 8(b)(4)(B) of the Act is designed to shield neutral employers from union pressures arising out of a labor dispute between the union and its real adversary; at the same time, this provision does not purport to interfere with the union's right to carry on traditionally lawful "primary" strike and picketing activities. Where the union's real adversary, the employer with whom it has the underlying labor dispute, shares common premises with neutral employers, the problem of effectuating both of these objectives may require a detailed scrutiny of the circumstances in order to ascertain whether the union's activity was aimed solely at the disruption of the primary employer's business relationships. Specifically, picketing at the common situs may well be the only effective method of bringing pressure to bear on the primary employer. Accordingly, the law allows such picketing, even where it has the effect of disrupting relations between the neutral employers and their own employees, customers and suppliers, so long as the union takes the measures

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[2] The General Counsel did not allege, and the Board did not find, any violation because of picketing prior to November 18 (J.A. 36).

appropriate in the circumstances to limit the inherent inducements and restraints of its picket line to the primary employer, and to minimize the impact on the neutrals. On the other hand, where the facts show that the union has deliberately sought to enmesh the neutrals, to an extent beyond that required by the mere fact of a common situs, the Board is entitled to find that an object of the union's conduct is the one forbidden by the Act.

II.

In this case, the facts speak plainly of a deliberate union effort to induce a boycott against the neutral employers on the premises. On and after November 18, the entrance to the premises used by neutral employees was, by direction of the general contractor on the job, not available to the primary employer (Calhoun) and his employees. Calhoun was instead required to use a separate entrance and the Union was so notified. Nonetheless, and despite the absence of any circumstances showing that this separate entrance was an inappropriate location for activities against Calhoun, the Union picketed at the neutral entrance and only at the neutral entrance. Hence, the Board could properly find that the Union intended to place a boycott on the neutral employers; and since the Union manifestly was seeking the termination of Calhoun's subcontract as the eventual aim of this boycott, all elements of the Section 8 (b) (4) violation are clearly established.

III.

The foregoing Board analysis does not rest upon any new doctrines promulgated in *Local 761, Electrical Workers* v. *N.L.R.B. (General Electric)*, 366 U.S. 667. Nor is such support required. *General Electric* clarified the principles applicable to picketing at the primary employer's own plant. The Supreme Court held that, with respect to such picketing, a distinction could properly be drawn between union appeals to neutrals performing work related to the normal operation of the primary employer's plant and those performing other work, such as making capital improvements. The Supreme Court, however, did not intend to alter the principles which were previously applied to a true common situs, such as existed here. On the contrary, the Supreme Court specifically approved the use of the Board's *Moore Drydock* criteria for assessing the Union's object in common situs situations.

ARGUMENT

I. The Board Properly Found That the Union's Picketing At the Main Entrance To the Construction Site On November 18 and 19 Violated Section 8(b)(4)(i)(ii)(B) of the Act

A. *The controlling principles*

Section 8(b)(4) of the Act, as amended, provides that it shall be an unfair labor practice for a labor organization or its agents:

> (i) to engage in, or to induce or encourage any individual employed by any person engaged

in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, material or commodities or to perform any services; or

(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . .: *Provided*, That nothing contained in this clause (b) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

These provisions reflect "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 692. In some Section 8(b)(4) situations, both of these "dual objectives" may readily be given full scope. Thus, generally speaking, union activity occurring at the primary employer's own premises, and seeking no more than the disruption of his own normal operations, is considered as primary, and within the tra-

ditional area of protected union activity. On the other hand, activity extending beyond the premises of the primary employer, and designed to disrupt the operations of other employers, is secondary and prohibited. Compare, *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, 672 with *N.L.R.B.* v. *United Brotherhood of Carpenters, etc.*, 184 F. 2d 60 (C.A. 10), cert. denied, 341 U.S. 947. And see generally, *Retail Fruit & Vegetable Clerks Union (Crystal Palace Market)* v. *N.L.R.B.*, 249 F. 2d 591, 597-600 (C.A. 9); *Amalgamated Meat Cutters* v. *N.L.R.B. (Swift & Co.)*, 99 App. D.C. 24, 30, 237 F. 2d 20, 26-27, cert. denied, 352 U.S. 1015.

In other situations, however, these "dual objectives"—the union's right to subject its adversary to economic pressures and the neutral employer's immunity from pressures—cannot both be fully satisfied and an accommodation must be reached. Illustrative of such a situation is the typical common situs construction project case, where the primary employer and neutral employers share the same location. Here, unrestricted union activity at the entrances to the premises, designed to blockade the jobsite by turning away all approaching employees, customers, suppliers and services, would manifestly be inconsistent with the neutral employers' intended immunity. Conversely, if the union is to be deprived of all opportunity to picket the primary employer at the common project, its right to bring pressure at all is largely illusory, for that project is often the primary employer's only place of business in the area of the dis-

pute. The Board has met the problem by treating picketing at a common worksite as primary so long as every reasonable effort is made to confine it to the primary employer, and as secondary when there is a direct and purposeful effort to involve the neutral employer.

Thus, in *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 549, involving a common situs, the Board stated:

> In the kind of situation that exists in this case, we believe that picketing . . . is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the *situs* of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer.

Under this approach, if neutral employees stop work as a result of picketing at a common situs, it is a question of fact in each case whether the stoppage occurred as an incident of picketing the primary employer, or because the secondary employees were drawn into the dispute to a greater extent than primary picketing would necessarily involve; and the question is answered, in each case, by looking essentially to the means which the union used in promoting its cause.

This approach, we submit, is well calculated to implement the dual congressional objectives involved. On the one hand, unions remain free to picket at the common situs or to engage in other activities there designed to cause a disruption of the primary employer's business so long as they are careful to refrain from any more direct attempt to disrupt the operations of neutral employers on the premises. On the other hand, the neutral employers are themselves subjected to economic pressures not significantly different from those suffered by an employer who comes to a struck plant and seeks to do business with the struck employer. As this Court explained in *Seafarers' International Union* v. *N.L.R.B.*, 105 App. D.C. 211, 217, 265 F. 2d 585, 591:

> No matter how great the pressure on a neutral employer may be when someone else's place of business is picketed, it is essentially different from the pressure such a neutral feels when his own business is being picketed. This difference in pressure, between that which occurs, somewhat indirectly, when another employer's premises are picketed and that which occurs when a neutral employer's own premises are picketed, is the rationale which must govern the interpretation of Section 8(b)(4).
>
> In this case, Todd [the neutral] was under economic pressure . . . But this pressure . . . was not different from that felt by servicers or suppliers under the most ordinary circumstances when a customer of theirs is picketed.

In short, the Board solves the common situs problem by asking, in each such case, whether the union intended to place a boycott *only* on the primary employer—in which case any consequent economic effects on neutrals are immaterial—or whether it intended to place a boycott on the neutrals as well. And, in each case, the Board seeks the answer to that question in "the nature of the acts performed" by the union. *Seafarers, supra*, 105 App. D.C. at 217, 265 F. 2d at 591. The federal courts have approved of the Board's approach.[4]

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[4] *N.L.R.B.* v. *Associated Musicians*, 226 F. 2d 900 (C.A. 2), cert. denied, 351 U.S. 962; *N.L.R.B.* v. *Service Trades, Chauffeurs, etc.*, 191 F. 2d 65 (C.A. 2); *Piezonki* v. *N.L.R.B.*, 219 F. 2d 879 (C.A. 4); *N.L.R.B.* v. *General Drivers, etc., Local 968*, 225 F. 2d 205 (C.A. 5), cert. denied, 350 U.S. 914; *N.L.R.B.* v. *Chauffeurs, Teamsters, etc., Local 135*, 212 F. 2d 216 (C.A. 7); *N.L.R.B.* v. *Local Union No. 55*, 218 F. 2d 226 (C.A. 10); *Sales Drivers, etc.* v. *N.L.R.B.*, 97 U.S. App. D.C. 173, 229 F. 2d 514, cert. denied, 351 U.S. 972.

B. *The Union's conduct in this case amply warranted the Board's inference that its picketing was for a forbidden object*

Application of the foregoing principles to the facts of this case manifestly supports the Board's conclusion that the Union *intended* by its conduct to boycott neutral employers in order to force a cessation of business between Calhoun, the subcontractor with whom it had a labor dispute, and Mays, the neutral general contractor.[8]

Thus, immediately before the picketing began, Union representative Seaquist approached Mays and indicated that "economic action" would probably be taken on the job unless the situation respecting the "substandard" Calhoun were "straightened out." The next day, October 30, Union pickets began patrolling the sidewalk in front of the main entrance to the jobsite, with signs stating that Calhoun was "unfair" and operated under "substandard working conditions." Since the signs designated Calhoun as the target of the picketing, and since Calhoun and its employees were at the time using that entrance, the picketing conformed to the *Moore Drydock* criteria and there was no basis for concluding that it was

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[8] Petitioners contend (Br. 15) that Mays was not a true neutral because, in the event of labor difficulties, he might take over Calhoun's work and perform it with his own employees. But the record shows that the Union had no objection to the work being performed by someone other than Mays; rather, its grievance was that Calhoun, the particular subcontractor selected by Mays, did not operate under the Union's standards. See *Denver Building, supra*, 341 U.S. at 688.

other than primary. However, beginning on November 18, a private entrance was established exclusively for the use of Calhoun and his employees, and the Union was so notified. From that time on, the Union, if it were directing its picketing only at Calhoun, could have done so, with minimal impact on the neutral employers on the jobsite, by confining its picketing to the Calhoun entrance. Instead, on instructions from Seaquist, the Union did not picket that entrance at all, but continued to picket the main entrance, now used only by the neutral employers and their employees. By failing to confine its picketing to the Calhoun entrance, the Union failed to limit its activity to "places reasonably close to the location of the *situs*" of the primary dispute (see *Moore Drydock, supra*, p. 12). The Board was therefore warranted in concluding that the real target of the picketing was not Calhoun, but the neutral employers, and that hence, despite the legend on the signs, the picketing was in fact secondary.[6] See *Retail Fruit & Vegetable Clerks Union (Crystal Palace Market)* v. *N.L.R.B.*, 249 F.2d 591, 598 (C.A. 9); *N.L.R.B.* v. *Monterey County Building & Construction Trades Council*, 335 F.2d 927 (C.A. 9), cert. denied, 380 U.S. 913; *Millwrights Local Union No. 1102, (Dobson Heavy Haul, Inc.)*, 155 NLRB No. 126.

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[6] Indeed, at the Board hearing, Seaquist acknowledged that the picketing was directed not only at Calhoun's employees and the public, but also at "workers on the job" and "other crafts on the job" (*supra*, p. 5).

The situation here is similar to that in the *Denver Building* case, *supra*. There, as here, the union had a dispute with a non-union subcontractor, and, when its efforts to get the general contractor to remove the disfavored subcontractor failed, it picketed the construction site on which they and other employers worked. The Board found that the picketing was aimed at the neutral employers and thus secondary, and the Supreme Court sustained that finding.[7] See also *IBEW, Local 501* v. *N.L.R.B.*, 341 U.S. 694. To be sure, the principal basis for inferring secondary object in that case was that the picket signs labelled the entire job as "unfair," whereas here secondary object is inferred from the fact that the picketing was not confined as closely as possible to the situs of the primary dispute.[8] But this merely reflects that

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[7] In 1959, Congress amended Section 8(b)(4) to provide that strikes for a cease doing business object—previously violative of Section 8(b)(4)(A)—would thereafter be violative of Section 8(b)(4)(B). The legislative history makes it clear that the *Denver Building* rule was not intended to be altered. See I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 942 (G.P.O., 1959).

[8] Before the Board, the Union contended that it would be erroneous to infer that the picketing was directed at neutral employees merely because the Union continued to picket at the main entrance even after that gate had been closed to Calhoun and Calhoun's employees. Thus, Union Representative Seaquist testified that his reason for refusing to move the pickets to the private road had nothing to do with any union preference for subjecting neutral persons to the pressures of the picket line. According to Seaquist, he decided to keep the pickets at the entrance used only by the neutrals and refrain

a secondary object may be inferred from a variety of different circumstances; it does not alter the governing principle, which is the same in both cases, i.e., picketing at a common situs may be deemed to be secondary where all the circumstances indicate that it is aimed at the neutral employers on the job site, rather than at the primary employer. See *United Steelworkers* v. *N.L.R.B.*, 111 App. D.C. 60, 62-63, 294 F. 2d 256, 258-259 (secondary object inferred from the fact that picketing occurred at a geographically separated site where no primary employees were present); *Truck Drivers, Local Union 728* v. *N.L.R.B.*, 101 App. D.C. 420, 249 F. 2d 512, cert. denied, 355 U.S. 958 (secondary object inferred from the fact that the union had attempted to induce the neutral employer to sever business relations with the primary employer, and the pickets made no effort to explain to the neutral employees that the picketing

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from picketing the private road because "we could be in a very bad situation . . . if we would picket a residence where there would be people living, we could be in a criminal suit, civil suit" (J.A. 27). But the Trial Examiner noted that there was no evidence in the record to show that the Union had made any effort to discover from the inhabitant or owner of the private home whether Calhoun had permission to use the private road, or whether the Union could have such permission. Moreover, Calhoun credibly testified that he had proper permission to use the private entrance. (J.A. 37.) Accordingly, the Examiner rejected Seaquist's testimony, viewing it as a pretext (J.A. 39); the Board affirmed this finding (J.A. 44); and petitioners apparently do not challenge the propriety of that finding here.

was not aimed at them).[9] See also *N.L.R.B.* v. *Highway Truckdrivers & Helpers Local 107*, 300 F. 2d 317, 321-322 (C.A. 3); *Brown Transport Corp.* v. *N.L.R.B.*, 334 F. 2d 30, 37-39 (C.A. 5); *N.L.R.B.* v. *Local 294, IBT*, 284 F. 2d 887, 892-893 (C.A. 2); *N.L.R.B.* v. *International Hod Carriers Union*, 285 F. 2d 397, 401-402 (C.A. 8), cert. denied, 366 U.S. 903.

Nor is it material that there may have been *other* objects of the picketing. Since the Board could find that *an* object was to boycott neutrals in order to force the termination of Calhoun's subcontract, the violation of Section 8(b)(4)(B) is established (*Denver Building, supra*, 341 U.S. at 689), regardless of whether the Union was also interested in appealing to Calhoun's own employees (Pet. Br. 12), to patrons of the drug store and medical offices on the premises (Pet. Br., 15), or to others.[10]

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[9] Similarly here, the pickets refrained from speaking, giving union members making inquiries as to the purpose of the picketing written notices to consult their own unions (J.A. 38).

[10] Petitioners contend that they could "properly address an appeal to Calhoun's employees throughout the entire working day, and not just at the times when such employees entered or left the construction premises" (Br. 12). But there is nothing in the record to suggest that Calhoun's employees, while on the jobsite, could see the pickets at the main gate. Indeed, the fact that these employees, once on the job, are engaged in the installation of *interior* walls makes it highly unlikely that they would be affected by the picketing at any gate other than the one through which they entered and departed.

C. *Petitioners' defenses are lacking in merit and the* General Electric *case is inapposite*

Petitioners claim that "The Board's decision is bottomed on the 'reserve gate' doctrine approved in *Local 761 IUE* v. *N.L.R.B.* [the *General Electric* case], 366 U.S. 667", that the Board erred in so premising its result, and that the *General Electric* doctrine "cannot be applied to invalidate picketing at a common construction site" (Br., 6).

The simple answer is that the Board's decision is *not* based upon *General Electric* at all. There is nothing in the General Counsel's complaint, the Trial Examiner's Decision, or the Board's Decision and Order to support petitioners' contrary assertion. As already shown, the Board treated this case as a "common situs" problem and focused its inquiry upon a determination of whether the picketing had been conducted with the restraint required to accommodate the rights of the neutrals at the site, or whether the Union's conduct evidenced a deliberate effort to bring forbidden pressures to bear on them. Because of the precise location of the picketing, the concession that their appeal was directed at neutrals, and the prior threat to take "economic action" if Calhoun were not removed from the job, the Board concluded that the picketing had an object of inducing neutral employees to cease working, and of coercing neutral employers, in order to induce a cessation of business between Mays and Calhoun (J.A. 44, n. 2). Or, as the Trial Examiner put it, the Union's conduct was "consistent

only with an intent to enlarge rather than limit the area of the dispute" (J.A. 39).

General Electric, on the other hand, involved not a true common situs situation, but picketing at the primary employer's own plant. As shown (p. 10-12), where picketing is confined to the primary employer's own premises, the right to engage in primary activity is accorded greater scope than where it is conducted at a site which is the regular work place of a number of independent employers. Thus, so long as the union confines its picketing to the vicinity of the primary employer's plant, it is entitled to make direct appeals to suppliers, deliverymen, and other neutrals not to service or otherwise aid the operation of that plant. See *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665; *United Steelworkers* v. *N.L.R.B. (Carrier Corp.)*, 376 U.S. 492. But, at a common situs, the interests of the neutral employers warrant as much consideration as does the union's interest in exerting pressure against the primary employer; hence, the union may not make a direct effort to implicate the neutrals, but must conduct its picketing in such a way as to minimize the impact on them. The question in *General Electric* was whether some qualification on the union's broad right to engage in picketing at the primary employer's own premises was justified where the union's efforts to implicate neutrals went to the extent of picketing a separate gate which had been established for the exclusive

use of neutrals and their employees. The Supreme Court answered this question in the affirmative.

The Supreme Court held that, with respect to picketing at the primary employer's plant, a distinction could properly be drawn between independent contractors who were performing work related to the regular operation of the primary employer's business and those who were performing other work, such as making capital inprovements. The union's right to appeal to the former at the primary employer's plant could not be restricted, but its right to appeal to the latter could be. In short, since the work performed by the contractors engaged in capital improvements was not related to the regular operation of the primary employer's business, pressure directed against them went beyond closing down the primary employer's day-to-day operations, the normal aim of legitimate primary activity. Therefore, a separate gate could properly be established for such contractors, and, if the union extended its picketing to that gate, the picketing could be found to be secondary. But the union had a right to appeal to the contractors furnishing services related to the regular operation of the primary employer's business anywhere on the primary premises, and hence, if they used the separate gate, picketing there would still be deemed primary. It was in this context that the Supreme Court stated that the "key to the problem is found in the type of work that is being performed by those who use the separate gate" (366 U.S. at 680). See also *United Steelworkers*, *supra*, 376 U.S.

at 499. Cf. *Teamsters, Local 901* v. *N.L.R.B.*, 110 App. D.C. 404, 293 F.2d 881.

The Supreme Court in *General Electric*, while clarifying the standards for picketing at the primary employer's plant, gave no indication of any intention to alter the principles which were previously applied with respect to determining whether picketing at a true common situs, exemplified by the construction project here, was primary or secondary; quite the contrary. As noted (p. 12), the *Moore Drydock* criteria are the chief means of assessing the union's object in a true common situs situation, and the Supreme Court, in *General Electric*, expressly approved the use of those criteria in the common situs situations where they had been applied (see 366 U.S. at 676-679).

In sum, *General Electric* has nothing to do with the situation here. In the common situs situation here, unlike the separate plant there, a union does not have a broad right to picket at the premises where the primary employer is working, but must confine its picketing insofar as possible to the operations of the primary employer on those premises. Where circumstances indicate that the union has not done so, its picketing becomes secondary. Hence, the establishment of a separate gate for Calhoun and his employees did not serve to limit a right which the Union otherwise had to picket wherever it pleased on the construction project, but was merely an objective means of defining that portion of the project where the primary employer's business was being car-

ried on. And, when the Union failed to confine its picketing to that location, the Board could properly regard that as indicative of an intention to extend the dispute beyond the primary employer—no less than if the Union had continued to picket after Calhoun had permanently left the project, or had picketed the entire project when the primary employer was only working in a particular corner and there was no barrier to picketing him there.[11]

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[11] Nor can the relationship between the various crafts on a construction site be regarded as the equivalent of an independent contractor performing tasks related to the regular operation of a manufacturing plant (see Pet. Br. 12). In *Denver Building, supra*, the Supreme Court rejected the argument that the crafts on a construction site were sufficiently interdependent to constitute in effect a single enterprise. As the Supreme Court there held: "The business relationship between independent contractors is too well established [to permit the picketing of one because of a grievance against the other]. 341 U.S. at 690. And this Court has recognized that it "is not the forum in which [the building crafts may] seek relief from" that rule. *Local No. 5, United Association, etc.* v. *N.L.R.B.*, 116 U.S. App. D.C. 100, 104, 321 F. 2d 366, 370, cert. denied, 375 U.S. 921. See also *Building Trades Council (Markwell & Hartz, Inc.)*, 155 NLRB No. 42 (review pending *sub nom. Markwell & Hartz, Inc.* v. *N.L.R.B.*, No. 23083 & No. 23214, (C.A. 5)).

CONCLUSION

For the reasons stated,[12] the petition for review should be denied and the Board's order should be enforced in full.

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National Labor Relations Board.

February 1966

[12] Petitioners' brief does not press the question raised in the Stipulation of whether the Board's decision impinges upon the Union's constitutionally protected rights of free speech. In any event, the law is well settled that "The prohibition of inducement or encouragement of secondary pressure by Section 8(b)(4)(A) carries no unconstitutional abridgment of free speech." *Electrical Workers, supra,* 341 U.S. 694, 705. Accord: *Truck Drivers & Helpers Local 728* v. *N.L.R.B.*, 101 U.S. App. D.C. 420, 423, 249 F. 2d 512, 515, cert. denied, 355 U.S. 958; *National Maritime Union* v. *N.L.R.B.*, 120 U.S. App. D.C. 299, 308, 346 F. 2d 411, 420, cert. denied, U.S. . Hence, if the Board's finding that the picketing here comes within the Act's ban on secondary activity is valid, there is no First Amendment bar to enforcement of the Board's order.

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PETITION FOR REHEARING.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,752

ORANGE BELT DISTRICT COUNCIL OF PAINTERS NO. 48, AFL-CIO, ITS AFFILIATED LOCAL UNIONS AND ITS AGENTS,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

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PETITION FOR REHEARING.

The Decision rendered by this Court on April 29, 1966, upholds the finding by the National Labor Relations Board that the Union violated Section 8(b)(4)(i) and (ii)(B) of the Act. This Court concluded in effect that the decision in *Electrical Workers v. Labor Board*, 336 U.S. 667 was not applicable to the instant case because

> "the record considered as a whole gives substantial evidentiary support to the findings of the Board that the Union engaged in conduct prohibited by the provisions of the Act . . .".

We believe that the instant case squarely presents the issue as to whether the establishing of a separate entrance for Calhoun employees could properly serve to invalidate petitioners' picketing by reason of its failure

to confine picketing to that entrance. It was conceded by the Board in its decision and also by the General Counsel that petitioners' activities were lawful and proper until November 18, 1963, when the separate entrance was established. This was for the reason that the picketing was conducted strictly in accordance with the criteria set forth in *Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547. It is true that the Board in its decision cited the conversation between Bill Seaquist and Cecil Mays prior to the commencement of picketing to the effect that Calhoun was unfair and that if the matter was not straightened, economic action would probably have to be taken on the job. Likewise, the Board cited the testimony of Mr. Seaquist to the effect that the picketing was directed not only to Calhoun's employees and the public but also to other crafts on the job.*

Nonetheless, the Board has made it clear that but for the fact that the petitioners failed to confine its picketing at the separate entrance, it would not have contended that such picketing violated the Act. Consequently, this

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*It has previously been urged by petitioner that Mr. Seaquist's statement to Mays of the Union's intent to picket only reflected his intent to picket in accordance with the Moore Dry Dock's standards and if the picketing complied with those standards and the reserved gate doctrine, then his statement could not serve as a basis of liability. Likewise, the fact that the picketing was said to be directed at other employees by itself would not constitute liability since, as the Supreme Court has said:

> ". . . picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer (*Local 761 v. NLRB*, 366 U.S. at page 674)."

case of necessity involves the application of the reserve gate doctrine as promulgated in *Electrical Workers v. Labor Board* (*supra*).

Petitioner has contended that at a common construction situs, the *Moore Dry Dock* principle applies where two or more employers are engaged in working on the same premises. However, where the employer attempts to manipulate the place at the construction site where picketing is to occur, then the reserve gate doctrine comes into play. Whether liability can then be predicated upon the reserve gate doctrine would depend upon an application of that doctrine as formulated in the *Local 761 v. NLRB* (*supra*), decision. In the instant case, because of the fact that the activities of the neutral employees were related to the normal operations of Calhoun, application of the reserve gate doctrine would necessitate a finding that the petitioner had not violated the Act.

For the above reason, petitioner requests that this Court reconsider its Decision and issue judgment on the merits.

Respectfully submitted,

RICHMAN, GARRETT & ANSELL,
HERBERT M. ANSELL,
THATCHER & BARR,
Attorneys for Petitioners.

Certificate of Counsel.

I am attorney of record for Petitioners and certify that in my judgment this Petition is well founded and that it is not interposed for delay.

HERBERT M. ANSELL

Dated, Los Angeles, California,
May 19, 1966.

PETITIONERS' REPLY BRIEF.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,752

ORANGE BELT DISTRICT COUNCIL OF PAINTERS No. 48, AFL-CIO, ITS AFFILIATED LOCAL UNIONS AND ITS AGENTS,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

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TABLE OF AUTHORITIES CITED

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The National Labor Relations Board in its answering brief essentially urges the following:

1. The Board does not predicate its claim of liability upon the "reserved gate doctrine" formulated in *International Brotherhood of Electrical Workers Local 501 v. NLRB*, 341 U.S. 694, but rather bases its case upon the Moore Dry Dock criteria established in *Sailors Union of the Pacific*, 92 NLRB 547.

2. The *General Electric* case is inapposite to the instant case since that decision involved the extent to which picketing at the premises of the primary employer was immune from restraint, whereas the instant case involves "common situs" picketing.

3. The basic question involved in the instant case is whether the secondary employers were "drawn into the

dispute to a greater extent than primary picketing would necessarily involve."

4. Although respondent union complied with the Moore Dry Dock criteria prior to the posting of the separate gate, it violated those standards by not remaining as reasonably close to the situs of the dispute as possible in that it failed to limit its picketing to the gate established for the exclusive use of Calhoun employees.

5. Further evidence of the responding union's intent to involve secondary parties is found from the fact that its representative advised the general contractor that unless Calhoun was removed from the job site, economic action would probably have to be taken on the job.*

6. Once finding therefore, *an* object of the picketing was unlawful, a violation is found even though the Union had the additional objective of appealing to the primary employees, and potential patrons of establishments located on the job site.

The Board's positions therefore is substantially in accord with that expressed in *Building Trades Council v. Markwell & Hartz, Inc.*, 155 NLRB No. 42, 60 LLRM 1296. In that case, the general contractor (M & H), was the primary disputant. It sub-contracted pile-driving work to Bissenger and electrical work to Barnes. After picketing commenced on the entire job site, a separate gate was established for the employees of the sub-contractors and their delivery personnel. When the Union failed to alter its picketing, the general contractor removed its own employees from the site,

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*Such statement only reflected the union's intent to picket in accordance with the Moore Dry Dock standards. If the picketing itself was not violative of law, the above statement of intort cannot independently support a finding of liability.

but picketing nonetheless continued. The Board in that case flatly rejected the *General Electric* rule as applied to a common situs, and based this position on the fact that in *General Electric,* the premises were owned by the primary struck employer whereas at construction situses, there are several employers performing functions. The Board concluded that the Moore Dry-Dock principles were dispositive of common situs picketing cases, relying heavily on the decision in *NLRB v. Denver Building Council,* 341 U.S. 675, 689-690. The Board finally concluded that "the court's decisions in General Electric and Carrier Corporation merely represent an implementation of the concomitant policy that lenient treatment be given to strike action taking place at the separate premises of a struck employer."

Thus the Board's holding in *Building Trades Council (Markwell & Hartz, Inc.), supra,* and its position taken in the instant case squarely raises the basic question as to the interplay between the reserve gate doctrine and the Moore Dry-Dock standards as applied to picketing at construction job situses.

Consideration of these two principles makes clear their distinction. The *Moore Dry-Dock* case laid out the Board's standards to be applied in testing the lawfulness of picketing when conducted at premises which because of their inherent geographical nature present intricate problems of distinction between primary and secondary appeals. In *Local 761, IUE v. NLRB (supra),* however, the Supreme Court dealt squarely with the question of determining the lawfulness of economic activities by reason of an employer's attempt to manipulate the place where primary picketing is to be allowed. In short, whereas the Moore Dry-Dock standards do not

concern an employers attempt to gerrymander various entrances to a job site, the reserved gate doctrine plainly meets this problem.

The Board in its Brief at page 14 concedes that "since the signs designated Calhoun as the target of the picketing, and since Calhoun and its employees were at the time using that entrance, the picketing conformed to the Moore Dry-Dock standards and there was no basis for concluding that it was other than primary." However, the Board concludes that from November 18, 1963 when the employer in an attempt to manipulate the place where Union picketing would occur, established a separate entrance, the Union then commenced to violate those standards for the sole reason that it refused to confine its activities as the employer desired. In effect, therefore, the Board not being prepared to accept the important qualifications attached to the reserved gate doctrine, and to meet the problems thus presented in applying the doctrine to a common situs situation, has rejected the doctrine in name, and simply adopted the reserve gate concept as a basis for liability under the guise of implementing the Moore Dry-Dock standards.

The Board's sole justification in virtually repudiating the Supreme Court's decision in the *General Electric* case, as applied to common situs picketing, is the distinction in ownership of the premises. This, however, is a distinction without a real difference. The General Electric firm and the contractor in that case, by way of analogy to the General Contractor and Calhoun in the instant case, regardless of formal title and relationship, were essentially two employers performing separate tasks on common premises. In both cases, General

Electric and Cecil Mays, respectively, sub-contracted out, for purposes of convenience, work for which those two firms were responsible. The Board's reasoning we submit would thus invalidate the reserved gate doctrine in the General Electric type situation to the same extent as in the instant case.

Even assuming that a distinction of substance exists between the industrial plant of the General Electric variety and the common construction situs problem of the instant case, such distinction could not materially affect the disposition of this case. The Court, in *Local 761, IUE v. NLRB (supra)*, although discussing the Moore Dry-Dock standards at length, never suggested that a different set of principles were to be used in determining the lawfulness of the Union picketing at common construction situses as distinguished from industrial plants. Had it intended to formulate different principles, it could have easily done so. Applying the Board's reasoning literally could result in a different set of rules to regulate picketing for each of the major industries in this Country. As the descent appropriately states in *Building Trades Council (Markwell & Hartz), supra:*

> "Significantly, Congress has not seen fit to distinguish between industries by adopting a more narrow definition of the lawful scope of picketing in the construction industry than is permitted in other industries. Certainly, the economic pressure sustained by neutral sub-contractors as a consequence of reserved gate picketing on a construction job is no different from that imposed by like conduct upon neutral sub-contractors performing work on premises occupied by a struck manufacturer."

The decision in the *General Electric* case does not support the Board's contention that the High Court intended to subordinate the reserved gate doctrine to the Moore Dry-Dock standards in the construction industry.

Likewise, the Board's heavy reliance on the decision in *NLRB v. Denver Building Trades Council (supra)* is misplaced. The court simply held in that case that despite their close relationship, the several contractors on a construction job were not allies or a single employer for purposes of the boycott provisions of the Act. The Court in the *General Electric* case assumed the separate legal status of General Electric and its contractors and addressed itself solely to the question of whether picketing at a reserved gate was indicative of an unlawful secondary objective. Likewise, the fact that a general and sub-contractor in the construction industry are treated as separate employers does not answer the important question as to whether the work of the secondary employer was related to the normal operations of the primary employer.

Plainly, the Supreme Court was well aware of the geographic nature of a construction situs and the integration of work functions among contractors at the time it formulated the reserved gate doctrine. The Board, we submit, well recognizes that if a labor union pickets at a common construction situs in accordance with the traditional Moore Dry-Dock standards, is it extremely difficult to predicate liability under the reserved gate doctrine. This is because of the fact that the work of one contractor is generally related and necessary to the normal operations of the struck employer. As the Board states in *Building Trades Council (Markwell & Hartz)*, at 60 LRRM 1299:

> "Given the close relation — which is not only characteristic of but almost inevitable at many stages of a building construction project — of the work duties of the various other employees with those of the primary sub-contractor, the principle of the dissent would also permit picket-line appeals to the employees of the neutral general contractor and other sub-contractors whatever the situation as to common or separate gates."

It is for this reason that having failed in its initial attempt to emasculate the right of Labor Unions to effectively address their appeals by peaceful picketing, in *General Electric Company,* 123 NLRB No. 1547 wherein it originated the reserved gate concept, the Board now seeks to avoid the necessary import of the important qualifications to that doctrine established by the Supreme Court, by simple device of including the reserved gate concept in its Moore Dry-Dock standards. Such position we submit, completely emasculates the Supreme Court's attempt to deal with the important problems posed in this area by its formulation of the reserved gate doctrine. We submit that the reserved gate doctrine is totally applicable to the instant case and that because of the fact that the work of secondary contractors was necessary to the normal operations of the prime employer, Calhoun, the attempt to establish a separate gate was invalid, and that the respondent Union by its activities did not violate any provision of the Act.

Respectfully submitted,

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